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Complaint

I

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3) and §1343(4). This is a suit in equity authorized and instituted pursuant to Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§2000a et seq., and 42 U.S.C. §1983. The jurisdiction of the Court is invoked to secure protection of civil rights and to redress deprivation of rights, privileges, and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States, §1; (b) the Commerce Clause, Article I, §8, Clause 3 of the Constitution of the United States; (c) Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§2000a et seq., providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U.S.C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States.

II

This is a proceeding for an injunction restraining defendant from continuing or maintaining any policy, practice, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive or otherwise interfering with the rights of plaintiffs and others similarly situated to admission to and full use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the Lake Nixon Club, Little Rock, Pulaski County, Arkansas.

III

The plaintiffs are (Mrs.) Doris Daniel and (Miss) Rosalyn Kyles both of whom are Negro citizens of the

United States and the State of Arkansas who reside in the City of Little Rock, Pulaski County, Arkansas. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated, pursuant to Rule 23 (a)(3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negro persons to purchase and/or enjoy the goods, services, facilities, privileges, advantages and accommodations of the facility known as the Lake Nixon Club who are so numerous as to make it impracticable to bring them all individually before this Court. A common relief is sought and the interests of this class are adequately represented by plaintiffs.

IV

Defendant Euell Paul, Jr., is the owner, manager or operator of the facility known as the Lake Nixon Club located near the City of Little Rock, Pulaski County, Arkansas. Said Lake Nixon Club is a place of public accommodation within the meaning of Title 42 U.S.C. 2000 (a) et seq. Lake Nixon serves and offers to serve interstate travelers. A substantial portion of the food and other items which it serves and uses moves in interstate commerce. Its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia.

V

On or about July 10, 1966, plaintiffs attempted to enter facility known as the Lake Nixon Club. Defendant or his agent refused the plaintiffs entry to the said Lake Nixon Club on the ground that the Membership of Lake Nixon Club was full and that no new memberships were

being accepted. On information and belief, the real reason for plaintiffs non-admittance was their race or color.

VI

Plaintiffs further allege on information and belief that the Lake Nixon Club is operated under the guise of being a private club solely for the purpose of being able to exclude plaintiffs and all other Negro persons. Plaintiffs allege on information and belief that any white person may be admitted to the use and enjoyment of the facilities of the Lake Nixon Club by merely presenting the entry fee.

VII

Plaintiffs allege that the racially discriminatory practices of defendant are in continuance of a well established and maintained policy of refusing plaintiff and others of their race admission to and enjoyment of the facilities of the Lake Nixon Club. The State of Arkansas has no State law, and the County of Pulaski and the City of Little Rock have no local laws or ordinances prohibiting the racially discriminatory practices complained of herein and establishing or authorizing a State or local authority to grant or seek the relief prayed for herein. Plaintiffs have no plain, adequate or complete remedy at law to redress these wrongs, and this suit for injunction is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendant's policy, practice, custom and usage as set forth herein until enjoined by the Court.

Wherefore, plaintiffs respectfully pray this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing to:

1. Forever enjoin defendant, his agents, successors, employees, attorneys, and those acting in concert with him and at his direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, segregating, withholding, conditioning, limiting, or otherwise interfering with plaintiff and others of his race in the admission to use of, and enjoyment of the goods, services, facilties, privileges, advantages, accommodations, etc., of the Lake Nixon Club on the basis of race or color as contrary to the Fourteenth Amendment to the Constitution of the United States, the Commerce Clause, Article I, §8, Clause 3 of the Constitution of the United States, Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §2000a et seq., and 42 U.S.C. §1981.

2. Allow plaintiffs their costs herein, reasonable attorney fees and such other, additional, or alternative relief as may appear to the Court to be equitable and just.

Respectfully submitted,

John W. Walker
1304-B Wright Avenue
Little Rock, Arkansas 72206

Jack Greenberg
Michael Meltsner
10 Columbus Circle
New York, New York 10019

Answer

Comes the Defendant herein, Euell Paul, Jr., and in answer to the Complaint filed herein, states:

(1) The Defendant admits the jurisdiction of this Court but denies that Plaintiff has been denied any Constitutional right by this Defendant.

(2) Admits the nature of this action.

(3) Admits the allegations of Paragraph III of Complaint.

(4) Admits that he is one of the owners of the Lake Nixon Club. Denies that the Lake Nixon Club is a place of public accommodation within the meaning of Title 42 U.S.C. 2000(a) et seq. Denies the Lake Nixon serves or offers to serve interstate travelers within the meaning of the laws of the United States. Denies that a substantial portion of the food and other items which it serves and uses moves in interstate commerce. Denies that its operations affect travel, trade, commerce, transportation or communication between and through the several States and the District of Columbia within the meaning of Title 42 U.S.C. 2000(a) et seq.

(5) The Defendant admits the allegation in Paragraph V of the Complaint.

(6) Defendant denies that the Lake Nixon Club is operated as a club solely for the purpose of being able to exclude Negroes. Denies that any white person may be admitted to the use and enjoyment of the Club by paying the entry fee.

(7) Defendant denies that part of Paragraph VII of the Complaint which alleges that Plaintiff will be injured in

any manner by being denied admission to Defendant's swimming pool.

(8) Further answering, Defendant states that he operates Lake Nixon Club as a place to swim, that he has a large amount of money invested in the facility, and that if he is compelled to admit Negroes to the Lake, he will lose the business of white people and will be compelled to close his business. The value of his property will be destroyed and he will be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Defendant prays that Plaintiff's Petition for an injunction be denied; for his costs herein and for all other proper relief.

Interrogatories

To: Mr. Sam Robinson

115 East Capitol Street
Little Rock, Arkansas

Plaintiffs request that the defendant, Enell Paul, Jr., answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following Interrogatories:

1. List the kinds of licenses which you have obtained relative to the operation of the Lake Nixon Club.
2. Where have you advertised during the last twelve months? Give the dates, places and content of such advertisements.
3. State whether any interstate travelers have become members of the Lake Nixon Club or otherwise used the facilities of the Lake Nixon Club.
4. List the names and addresses of the suppliers who supply the goods and products which are sold at Lake Nixon Club.
5. Set out the amount spent by Lake Nixon Club for food purchases and other supplies during the period September 1, 1965, and September 1, 1966.
6. State whether or not either of the following items is served or sold at the Lake Nixon Club: (a) coffee, (b) tea, (c) beef (hamburgers, etc.), (d) cigars, (e) chewing gum, (f) sugar, (g) beer, (h) soft drinks.
7. What was the annual gross income of the Lake Nixon Club for each of the last two years? (Please provide a profit and loss statement as appendix to this answer.)

Interrogatories

8. List the names of the insurance companies which insure Lake Nixon Club and set out the types of coverage provided for each.

9. List the names and addresses of the financial institutions with whom Lake Nixon Club does business?

10. Has Lake Nixon Club obtained any loans from any financial institution or individual within the last two years? If answer is affirmative, state the name of such institution or individual.

11. State the name and address of the owner of the real property under the management of Lake Nixon Club.

12. State whether the property specified in Interrogatory 11 is under the control of Lake Nixon Club pursuant to a lease or rental agreement. If answer is affirmative, attach a copy of such agreement to this interrogatory. If answer is negative set out in detail the arrangement between Lake Nixon Club and the owner of said property and specify the date made.

13. Attach a copy of the Articles of Incorporation and by-laws of the Lake Nixon Club to this interrogatory.

14. List for each officer of the Lake Nixon Club the following: names, office held, date elected and address.

15. Set out the dates of the meetings, regular or special, held by defendant, the number of persons present at each and the names of same.

16. List the criteria for membership in the Lake Nixon Club.

17. List the criteria for non-membership use of Lake Nixon Club.

Interrogatories

18. State whether prior to July 2, 1964, Lake Nixon was operated as a racially segregated facility.

19. State whether membership cards in the Lake Nixon Club are offered and issued to white persons who seek to use Lake Nixon if those persons pay the membership fee.

20. State the amount of the membership fee in the Lake Nixon Club and also the period of time such fee entitles members to club privileges.

21. State whether membership cards in the Lake Nixon Club are offered and issued to Negro persons who seek to use the Lake Nixon Club if those persons pay the membership fee.

22. State whether the Lake Nixon Club has a committee responsible for screening applicants for membership. If so, state the name of such committee, the names, addresses and telephone numbers of present committee members, the dates of their meetings during 1966, their responsibilities, the number and names of persons added by the committee to the membership rolls during 1966 and the race of such persons, the number of such persons rejected by said committee during 1965 and the race of such persons.

23. State whether white persons seeking admission thereto were routinely admitted (conditionally or otherwise) to the Lake Nixon Club upon payment of the initial fee of membership plus other admission costs.

24. State whether Negro persons seeking admission thereto were routinely denied (conditionally or otherwise) admission to and/or membership in the Lake Nixon Club.

Interrogatories

25. State whether plaintiffs attempted to use the facilities of Lake Nixon Club during July, 1966. If so, state whether they were offered membership cards and otherwise explain in detail the response given to plaintiffs by you or your employee at aforesaid time.

26. State what constitutes membership in Lake Nixon Club that is "filled up" or full.

27. State whether John L. Parke is a member of Lake Nixon Club? Robert Davis? John Denvir? John Lewis?

Please take notice that answers to the foregoing Interrogatories should be served upon plaintiff's counsel within fifteen days from this date.

Answers to Interrogatories

To: Mr. John W. Walker

1304-B Wright Avenue
Little Rock, Arkansas

Comes Euell Paul, Jr., and for his Answers to Plaintiffs' Interrogatories, states:

Interrogatory No. 1. List the kinds of licenses which you have obtained relative to the operation of the Lake Nixon Club.

Answer: None.

Interrogatory No. 2. Where have you advertised during the last twelve months? Give the dates, places and content of such advertisements.

Answer: KALO Radio, Friday Night Beach Party, advertised Wednesday, Thursday and Friday from last day of May through September 7th.

Little Rock Today (Monthly Magazine) one time in May.

Little Rock Air Force Base (Monthly Paper) one time in June.

Interrogatory No. 3. State whether any interstate travelers have become members of the Lake Nixon Club or otherwise used the facilities of the Lake Nixon Club.

Answer: Not that I know of.

Interrogatory No. 4. List the names and addresses of the suppliers who supply th goods and products which are sold at Lake Nixon Club.

Answer: K. Brown Packing Company, Vogel's, Inc., Muswick Beverages, Bordon's of Arkansas, Wonder Bakery, Frito-Lay, and Coca Cola Bottling Company.

Interrogatory No. 5. Set out the amount spent by Lake Nixon Club for food purchases and other supplies during the period September 1, 1965, and September 1, 1966.

Answer: $5,550.87.

Interrogatory No. 6. State whether or not either of the following items is served or sold at the Lake Nixon Club: (a) coffee, (b) tea, (c) beef (Hamburger, etc.), (d) cigars, (e) chewing gum, (f) sugar, (g) beer, (h) soft drinks.

Answer: We do not sell or serve coffee, tea, beef (as such), cigars, chewing gum, sugar or beer. We do sell hamburgers and soft drinks.

Interrogatory No. 7. What was the annual gross income of the Lake Nixon Club for each of the last two years? (Please provide a profit and loss statement as appendix to this answer.)

Answer: 1965 Gross Income $41,170.00, Operating Expenses and Depreciation $26,048.72; 1966 Gross Income $46,326.00, Operating Expenses and Depreciation $28,434.00. This indicates the profit and loss.

Interrogatory No. 8. List the names of the insurance companies which insure Lake Nixon Club and set out the types of coverage provided for each.

Answer: Fireman's Fund Insurance Company: Bodily injury, property damage, workmen's compensation, products.

Interrogatory No. 9. List the names and addresses of the financial institutions with whom Lake Nixon Club does business?

Answer: Benton State Bank, Benton, Arkansas and First National Bank, Little Rock, Arkansas.

Interrogatory No. 10. Has Lake Nixon Club obtained any loans from any financial institution or individual within the last two years? If answer is affirmative, state the name of such institution or individual.

Answer: No loans have been obtained.

Interrogatory No. 11. State the name and address of the owner of the real property under the management of Lake Nixon Club.

Answer: My wife and I own the property and live there at Lake Nixon.

Interrogatory No. 12. State whether the property specified in Interrogatory 11 is under the control of Lake Nixon Club pursuant to a lease or rental agreement. If answer is affirmative, attach a copy of such agreement to this interrogatory. If answer is negative set out in detail the arrangement between Lake Nixon Club and the owner of said property and specify the date made.

Answer: Lake Nixon Club is owned by my wife and I. No other arrangement.

Interrogatory No. 13. Attach a copy of the Articles of Incorporation and by-laws of the Lake Nixon Club to this interrogatory.

Answer: It is not incorporated.

Interrogatory No. 14. List for each officer of the Lake Nixon Club the following: name, office held, date elected and address.

Answer: There are no officers.

Interrogatory No. 15. Set out the dates of the meetings, regular or special, held by defendant, the number of persons present at each and the names of same.

Answer: There have been no meetings.

Interrogatory No. 16. List the criteria for membership in the Lake Nixon Club.

Answer: My wife and I exercise our own judgment and refuse those we do not want.

Interrogatory No. 17. List the criteria for non-membership use of Lake Nixon Club.

Answer: There is no non-membership use of the facilities.

Interrogatory No. 18. State whether prior to July 2, 1964, Lake Nixon was operated as a racially segregated facility.

Answer: Yes.

Interrogatory No. 19. State whether membership cards in the Lake Nixon Club are offered and issued to white persons who seek to use Lake Nixon if those persons pay the membership fee.

Answer: In most cases.

Interrogatory No. 20. State the amount of the membership fee in the Lake Nixon Club and also the period of time such fee entitles members to club privileges.

Answer: Twenty-five cents for one season.

Interrogatory No. 21. State whether membership cards in the Lake Nixon Club are offered and issued to Negro persons who seek to use the Lake Nixon Club if those persons pay the membership fee.

Answer: No.

Interrogatory No. 22. State whether the Lake Nixon Club has a committee responsible for screening applicants for membership. If so, state the name of such committee, for names, addresses and telephone numbers of present committee members, the dates of their meetings during 1966, their responsibilities, the number and names of persons

added by the committee to the membership rolls during 1966 and the race of such persons, the number of such persons rejected by said committee during 1965 and the race of such persons.

Answer: There is no committee.

Interrogatory No. 23. State whether white persons seeking admission thereto were routinely admitted (conditionally or otherwise) to the Lake Nixon Club upon payment of the initial fee of membership plus other admission costs.

Answer: Yes.

Interrogatory No. 24. State whether Negro persons seeking admission thereto were routinely denied (conditionally or otherwise) admission and/or membership in the Lake Nixon Club.

Answer: I cannot say that we refuse Negroes admission to the swimming pool as a routine matter because only two or three Negroes, I forget which, ever sought admission to the pool and that was in the summer of 1966. At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it.

Interrogatory No. 25. State whether plaintiffs attempted to use the facilities of Lake Nixon Club during July, 1966. If so, state whether they were offered membership cards and otherwise explain in detail the response given to plaintiffs by you or your employee at aforesaid time.

Answer: We do not know the plaintiffs, but we did refuse admission to two or three Negroes. We told them the membership was closed.

Interrogatory No. 26: State what constitutes membership in Lake Nixon Club that is "filled up" or full.

Answer: It has never been "Filled up" or full.

Interrogatory No. 27. State whether John L. Parke is a member of Lake Nixon Club? Robert Davis? John Denvir? John Lewis?

Answer: I do not know whether these persons are members.

Signed: Euell Paul, Jr.

On this day personally appeared before me, Euell Paul, Jr., and after first being duly sworn, stated that the Answers to the foregoing Interrogatories are true.

Linda J. Grass
Notary Public

My Commission Expires:
Sept. 20, 1970

Be it remembered, that the above entitled and numbered causes came on to be heard before Honorable J. Smith Henley, United States District Judge, at Little Rock, Arkansas, on December 7, 1966, wherein the following proceedings were had, to wit:

Appearances:
In LR-66-C-149

For Plaintiffs: Mr. John W. Walker, Attorney at Law,
1304-B Wright Avenue,
Little Rock, Arkansas

For Defendant: Mr. Sam Robinson, Attorney at Law,
Adkins Building,
Little Rock, Arkansas

Proceedings

The Court: Gentlemen, we have this morning 1966 Cases C-149 and 150, set for trial at the same time, I don't know that they're necessarily consolidated, but many of the questions, I assume, may be common to both.

Gentlemen, for the Plaintiff, are you ready to proceed in these cases?

Mr. Walker: We're ready, Your Honor.

The Court: And for the defendants, Judge Robinson and Mr. Carroll?

Judge Robinson: The defendant Paul is ready, may it please the Court.

Mr. Carroll: The defendant Culberson and Spring Lake, Inc., are ready, Your Honor.

The Court: Very well.

Mr. Walker, you may proceed. I guess you're the plaintiff in both cases and have the burden.

Mr. Walker: I don't think an opening statement is necessary, Your Honor.

The Court: You may assume that the Court has read the files, and including the answers to the interrogatories that have been filed, and is reasonably familiar with the issues and that you may forego opening statements, if you wish.

Mr. Walker: Thank you.

I would like to call Mr. Euell Paul.

The Court: Mr. Paul in Court? Come around.

EUELL PAUL, called as a witness by and on behalf of Plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination
Questions by Mr. Walker:

Q. Will you state your name, your address and your occupation, please?

A. Euell Paul, Jr., Route 1, Box 77-A, engaged in recreation.

Q. I asked you to bring your insurance policy with you. Do you have that?

A. Yes, sir.

Q. Mr.—

The Court: Let's see, Mr. Paul, is the defendant in 149, is that correct?

Mr. Walker: That's right, Your Honor.

(Documents passed to counsel.)

Q. Mr. Paul, I hand you two insurance policies, which are made out in your name and your wife's name, I presume, Euell Paul, Jr., Oneta Paul, d/b/a, doing business as Lake Nixon, and ask if you're familiar with them?

A. Yes, sir.

Q. These policies are written by Firemen's Fund Insurance Company, is that correct?

A. Yes, sir.

Q. Did you take those policies out yourself?

A. Yes, sir.

Q. Now, would you state to the Court whether Lake Nixon is a private club?

A. Yes, sir.

Q. It is a private club; what are the purposes of the club?

A. Swimming.

Q. What else?

A. Just general relaxation.

Q. Any other purpose?

A. No, sir.

Q. Do you have incorporation papers?

A. No.

Q. Yours is an unincorporated club?

A. Yes, sir.

Q. What are the membership criteria?

A. You mean the amount?

Q. No; what does it take to become a member of your club?

A. The approval of my wife and I.

Q. The approval of your wife and yourself?

A. Yes.

Q. Anybody else?

A. No, sir.

Q. Now, what criteria do you have for deciding whether to include someone?

The Court: Mr. Walker, I'm reluctant to interrupt you. Haven't you covered the material you're now covering in your interrogatories and the—

Mr. Walker: To a limited extent, Your Honor.

The Court: Go ahead.

The Witness: Would you repeat the question, please?

Mr. Walker: Yes.

Q. What considerations do your wife and yourself use in determining whether to admit someone to the club?

A. We judge on the basis of how we feel they will get along with the—together.

Q. Together; isn't it true you admit any white person?

A. Pardon?

Q. Isn't it true you admit any white person to membership—

A. No, sir.

Q. Just as long as that person is well mannered?

A. Not in all cases, no.

Q. As long as he is well mannered and dressed properly you will admit him, don't you?

A. In some cases.

Q. In almost all cases?

A. In a large majority.

Q. How many members do you have?

A. Well, I do not know.

Q. How frequently does the club meet?

A. Every day.

Q. You mean the members of the club?

A. Periodically.

Q. What periods?

A. Well, mostly on sunny days.

Q. Do you have membership meetings?

A. No, sir.

Q. Have you ever had a membership meeting?

A. No, sir.

Q. Would you know how to get in touch with the membership if you wanted to?

A. No.

Q. Does the club—

A. Could I retract that? In one way, notification on the bulletin there at the club.

Q. Now, do the members of the club have the responsibility for naming the employees of the club?

A. No.

Q. That is you and your wife's exclusive responsibility?

A. Yes.

Q. Do the members of the club have the responsibility for fixing your salary?

A. No.

Q. You fix that yourself?

A. Yes, sir.

Q. Do the members of the club have any responsibility with regard to distribution of the profit that you make?

A. No.

Q. Did you advertise for persons to come and make use of the facilities during the summer.

A. Members only.

Q. Did you advertise for members?

A. Not that I can remember.

Q. But you do recall—

A. I've written so many that I didn't keep copies of them, which I should have, I didn't know this would happen, and I didn't keep copies of them, but to my knowledge as far as I know all ads were written stated strictly to members only.

Q. You were not inviting new members to join?

A. Not that I can remember, no.

Q. Why did you advertise then?

A. To let the members know what was taking place.

Q. How many members did you have?

A. I don't know.

Q. Do you have any way of guessing how many you had the 1st of May?

A. No, sir.

Q. Would you say that you had a thousand at that time?

A. First of May?

Q. Yes.

A. No, sir, because we weren't open.

Q. Right; but you did advertise then to get members, didn't you?

A. No, because most people from the previous year and previous years before that renewed membership cards when we first started.

Q. Have you ever heard any of the advertisements on KALO or KAAY?

A. I run one on KAAY and the rest on KALO, but I wasn't able to hear all of them.

Q. Are you not aware they were inviting people generally to come out to Lake Nixon?

A. Our opening statement was basically, well, specifically stated that it was for members only.

Q. For members only?

A. Yes.

Q. But some of the people who came subsequent to May were not members only?

A. Some of the members brought other people.

Q. Other people came without other members, didn't they? Individuals?

A. Yes, that's right.

Q. Individuals came; did you ever pass out any membership cards without having a name set forth on the membership card?

A. Not to my knowledge; they were made to sign them right there.

Q. They were made to sign them right there?

A. Yes, sir.

Q. I show you what purports to be a Lake Nixon membership card, and ask you to identify that?

A. That is mine.

Q. That is yours; is there a name on that?

A. No, sir.

Q. I wonder how could one person obtain one of these without a name being on it?

A. At the main gate.

Q. At the main gate?

A. Yes.

Q. So that possibly your employees did just distribute them to some people that they wanted to distribute them to, is that right?

A. I hope not; but far as I know they didn't distribute them.

Mr. Walker: I'll mark this as Plaintiff's Exhibit No. for identifications, and I would like to have it introduced into the record.

(Thereupon, the document above referred to was marked as Plaintiff's Exhibit No. 1, for identification.)

The Court: Any objection, Gentlemen?

Judge Robinson: No, sir.

The Court: Let it be received.

(Thereupon, the document heretofore marked as Plaintiff's Exhibit No. 1, for identification, was received in evidence.)

Q. Now, do you know whether a man by the name of John Denver ever applied for membership?

A. No, sir.

Q. You don't know; of John Lewis? I show you two membership cards, the same as those, but these are signed, and ask are these yours?

A. Yes, they sure are.

Mr. Walker: I would like to have them marked Plaintiff's Exhibits 2-A and B.

(Thereupon, the documents above referred to were marked as Plaintiff's Exhibits 2-A and B, for identification.)

The Court: Which one is 2-A?

Mr. Walker: Denver, and Lewis is 2-B.

The Court: Let them be received.

(Thereupon, the documents heretofore marked as Plaintiff's Exhibits 2-A and B, for identification, were received in evidence.)

Q. Now, are you aware of the fact that you have a listing in the phone directory?

A. Yes.

Q. Are you also aware of the fact that there is a category in the yellow pages called "Private Clubs"?

A. Yes, I do.

Q. Are you aware of the fact that the Lake Nixon Club is not listed in that category in the yellow pages?

A. I am aware of that, due to a mistake.

Q. But it is not there; now, were you present when the plaintiffs sought to use the facilities of Lake Nixon?

A. No, sir.

Q. You were not; your wife was on duty at that time?

A. Yes.

Q. Now, to the best of your knowledge were the plaintiffs well mannered?

Judge Robinson: I believe he said he was not present at that time.

Mr. Walker: He has obviously had some conversation with his wife about that, and rather than have her testify—we can if you want to.

Q. Were they well mannered to the best of your knowledge?

A. Far as I know.

Q. Did they use any boisterous language or anything like that?

A. I don't know, I didn't go into any detail, and I wasn't there and I don't know.

Q. What did your wife tell them to the best of your knowledge?

A. That they would not be accepted.

Q. That they would not be accepted?

A. That the membership was full.

Q. Was the membership in fact full?

A. It has never been full.

Q. It has never been full?

A. It was full at that particular time of day.

Q. If these persons had been white what reason would you have had to reject them?

The Court: Mr. Walker, I wonder if that really is a proper question. Nobody knows what reason he might have had for rejecting them if they had been white. They could have been drunk or disorderly or some other condition that would have caused him to reject them. Really what you're getting at, I think, is simply were these people rejected because they were Negroes. Isn't that what you want to know?

Mr. Walker: Your Honor, I didn't put it that way but that's really what I wanted.

The Court: Let's get down to it, let's call a spade a spade and get right down to it. Is that why they were refused?

The Witness: Yes, sir.

The Court: All right.

Mr. Walker: Thank you, Your Honor.

Q. Now, isn't it true that from time to time non-members did use the facilities of Lake Nixon?

A. Really not to my knowledge. We kept a close eye on it.

Q. Didn't you state in your answer to the interrogatories that from time to time—well, didn't you state in your interrogatories, your answers, that from time to time persons other than members who were members of parties or groups were permitted to use the facilities?

A. Not unless they had a membership card.

Q. Did you give them a membership card for twenty five cents per person?

A. If they were on the premises and we knew about it.

Q. They had a membership card?

A. They had to have it. In fact,—

Q. What was the amount of membership?

A. Twenty five cents.

Q. Was this payable once per year?

A. Yes.

Q. Was there also an admission fee?

A. Yes.

Q. What was that?

A. Depending on what they wanted to do.

Q. Lets put it this way: The first time one would come to the Lake Nixon Club he would pay a twenty five cents membership fee?

A. If he was accepted.

Q. If he was accepted?

A. Yes.

Q. And then he would have to pay an admission into the park, into your amusement area, isn't that true?

A. Depending on what he wanted to do. Not necessarily. They could sit and do nothing and it didn't cost them anything.

Q. I see; all right, spell out what the cost were for doing a particular thing?

A. The swimming was fifty cents, if they were going to swim; and the boat rides were twenty five cents per person; the miniature golf was thirty five cents.

Q. What about the dances?

A. There was a dollar charge.

Q. One dollar charge for the dances; all right, now, you have a number of boats there; will you describe those boats?

A. They are just aluminum paddle boats.

Q. They are aluminum paddle boats?

A. Seat three or four people.

Q. I see, how many do you have?

A. Fifteen.

Q. Fifteen; what was the cost of each one, average cost?

A. We didn't buy them.

Q. You didn't buy them; are you renting them?

A. We lease them.

Q. What is the lease cost?

A. Based on the amounts that we do on them.

Q. So there's a percentage?

A. Yes, sir.

Q. What is that percentage?

A. I would have to look at the books.

Q. Would you say twenty five percent of what ever gross profit you receive?

A. I couldn't really say; my wife would know; it's in the books.

Q. Do you have something that might be described as hydroplanes?

A. No.

Q. Do you have any other kind of boats there?

A. We have what we call a yak.

Q. A yak; what's a yak?

A. It's similar to a surfboard.

Q. Similar to a surfboard; do you know where you purchased that?

A. From the same company.

Q. What company is that?

A. Aqua Boat Company.

Q. Who?

A. Aqua Boat Company.

Q. Is that a local Company?

A. No.

Q. Where is it?

A. I believe they're in Oklahoma, Bartlesville.

Q. Now, do you have any record player or juke boxes or anything like that out there?

A. Yes, sir.

Q. How many do you have?

A. Two.

Q. Two; the members, of course, entertain themselves with the juke boxes?

A. Yes.

Q. Now, these—I mean persons who put their nickels and dimes in any time during the day and get music and dance or whatever they want to do, is that right?

A. Right.

Q. Where did you get those juke boxes, a local amusement company?

A. Yes.

Q. What is the name of it?

A. I believe my wife knows; I can't remember the name.

Q. Do you know where those juke boxes happen to have been made?

A. No, sir, I don't.

Q. You have a place to dance there too, don't you?

A. Yes.

Q. And you customarily have dances on Friday nights and Saturday nights?

A. Mostly on Friday nights; very seldom on Saturday night; depending, if the weather is bad on Friday we switch to Saturday.

Q. Every week you've had a dance, if the weather—

A. Permits.

Q. Did you also have a concession stand there?

A. Yes.

Q. What concessions did you sell; what did you sell?

A. Basically hamburgers, hot dogs, and so on.

Q. Could you tell me how much money you spent for concessions during the 1965-66 year—well, during the summer of 1965?

A. I believe it is all in the records there, in the books.

Q. May I see them?

A. You sure can.

The Court: Isn't that in Interrogatory No. 5?

Mr. Walker: It is not in there, Your Honor. The profit and loss — of course, the profit was; it does not set out what the expenses are.

The Court: Interrogatory No. 5 sets out the amount spent by Lake Nixon for food purchases and other supplies during the period September 1, '65, and September 1, '66.

Mr. Walker: Right. My question is slightly different, Your Honor. I'm asking about concessions here, just the concession items. The supplies, perhaps, including a number of other things, items to clean the boats, things to keep up the — —

The Court: Well, if you have that readily available, Judge Robinson, the books there — —

The Witness: I imagine I can give you approximately.

Q. That's all I want.

A. Just approximately?

Q. Just approximately?

A. You mean what we spent for — —

Q. For concessions?

A. For the concession stand?

Q. Yes.

The Court: In 1965?

The Witness: I believe it ran some where pretty close together both years, usually around from five to six thousand.

Q. Five to six thousand dollars; now, will you state the percentage of income you received, the amount of your sales from the concessions?

A. I would say fifteen hundred to two thousand.

Q. Fifteen hundred to two thousand dollars profit, that's net profit?

A. I would say yes.

Q. So your gross sales would be considerably more than seven thousand dollars, isn't that true?

A. Yes, it is.

Q. Now, you did sell quite a few hamburgers, didn't you?

A. That is true.

Q. And that is the item probably that you sold most of, isn't it, among sandwiches?

A. I don't know, because the snack bar, we didn't run the snack bar.

Q. You didn't?

A. My sister-in-law, she took it over; I didn't have time to — —

Q. Did you lease it to your sister-in-law?

A. Not under a written lease, just an agreement, mutual agreement.

Q. But you shared the profits?

A. We shared with her.

Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?

A. No, very minor what we make off of that; food was a just a commodity to have there for the people if they wanted it; I mean we were not in the food business — there was no restaurant — it was just a necessity.

Q. If you do have your records broken down I would like to see those.

A. I sure do.

Mr. Walker: I will go on while you look for that, Mr. Robinson.

Q. Now, did you have bands out at your place on the week ends?

A. Yes.

Q. Were they local bands?

A. Yes.

Q. Do you know whether those bands happened to play in Jacksonville?

A. No.

Q. You really don't know where they played, do you?

A. Yes, I'm pretty certain they played just right here in Little Rock.

Q. Just for you; what band was it?

A. Well, we had the Romans, the Loved Ones. I can't remember the names of all — —

Q. You had a lot of different bands?

A. Yes.

Q. How can you be sure that they just played in Little Rock?

A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals.

Q. You really don't know whether they did or not, do you?

A. If they left the state I didn't know about it.

Q. All right, how much income did you obtain from admission?

A. To what particular — —

Q. Just generally admissions to what ever you had?

A. You mean what the gross was off the whole business?

Q. No, no, just your admissions; do you have your records broken down into receipts for admissions and membership from concession sales?

A. Everything was completely broken down and itemized.

Mr. Walker: Have you found that?

The Court: Let me suggest we might save a little time if we would take a few minutes recess and let you all go over this and point to Mr. Walker exactly what he wants, and then when we resume we'll put into the record only that portion that is desired and we won't encumber it with a good bit of material that no one wants.

Mr. Walker: Your Honor, I think that we can perhaps — I'm about finished with the witness — and we could perhaps stipulate with Mr. Robinson later.

The Court: Could you undertake to write it out on a piece of paper then and file it?

Mr. Robinson: Yes, Your Honor.

The Court: All right, go right ahead then and interrogate the witness on matters other than these figures and

at an appropriate time you make an abstract of them and file them.

Q. Did you also have milk sales?

A. What?

Q. Milk sales in your concessions?

A. We sold milk, yes.

Q. You did sell milk?

A. Yes.

Q. Did you sell pints, half pints?

A. Little half pints.

Q. Little half pints; that was with which dairy?

A. Borden's.

Q. Borden's; how many cartons do you think you would use in the course of a week?

A. I don't know.

Q. You also sold a lot of soft drinks, isn't that true?

A. Yes, sir.

Q. Now, we have propounded to you certain interrogatories which I would like to have introduced into the record at this time as Plaintiff's Exhibit 3.

The Court: I don't believe we'll give them an exhibit number, Mr. Walker, but they will be considered as part of the hearing record.

Mr. Walker: That's perfectly satisfactory.

The Court: They are already in the file; they were filed on November 3rd.

Mr. Walker: I have no more questions of this witness, Your Honor.

Mr. Robinson: I don't believe I have any questions in the nature of cross-examination. I think — —

The Court: If you prefer, it might be more orderly, you can defer what would be your direct examination until you are presenting your case.

Mr. Robinson: All right.

The Court: You may stand aside.

(Above witness temporarily excused.)

* * * * *

EUELL PAUL, JR., being recalled was examined and testified as follows:

Cross Examination Questions by Mr. Robinson:

The Court: You may testify under the same oath you took earlier, Mr. Paul.

Q. Mr. Paul, you were asked about insurance policies that you had protecting your business out there; did you buy this insurance from the Gulley Insurance Agency here in the City of Little Rock?

A. Yes, sir.

Mr. Robinson: That is all.

Mr. Walker: No more questions.

The Court: That's all, Mr. Paul.

(Above witness temporarily excused.)

Mr. Walker: Your Honor, we would like to offer by stipulation the contents of certain radio broadcasts that appeared on Radio Station KALO in Little Rock and Radio Station KAAY; and we would like to have those identified as plaintiff's and defendant's Exhibit 1; there will be three items; and we would like to admit them after the close of the case today so we can give the original copies back to the radio stations.

(Thereupon, the documents above referred to were marked plaintiff's and defendant's Exhibit 1, for identification.)

The Court: You have some arrangements whereby you'll copy the portions of their files that you wish to use and submit them after the Court adjourns?

Mr. Walker: Yes, your Honor.

The Court: All right.

(Thereupon, the documents heretofore marked Plaintiff's & Defendant's Exhibits 1, for identification, were received in evidence.)

The Court: Now, do you need these radio people for anything else? I notice there seem to be several of them in the Courtroom.

Mr. Walker: Your Honor, I would like to have a photo copy made and we will do that during the recess.

The Court: Let's take care of that right now and get them away from here, not that they are required to leave, but I imagine they want to go. Court will be in recess ten minutes.

(Short recess.)

The Court: Are you ready, Gentlemen?

Mr. Walker: Your Honor, the originals have been handed to the Clerk's office so duplications can be made and they will be entered into the record for the parties.

The Court: All right.

Mr. Walker: With regard to Lake Nixon we are now prepared to introduce one. We need not put the others in because they are all more or less similar.

The Court: All right.

Mr. Walker: I would like to read it to the Court. Judge Robinson advises it might be helpful to the Court.

The Court: If you like, just hand it to me and I will read it myself.

Mr. Walker: All right, Your Honor.

(Document passed to the Court.)

The Court: All right, now, what else do you have with respect to Lake Nixon?

Mr. Walker: Mrs. Doris Daniel.

MRS. DORIS DANIEL,

called as a witness by and on behalf of Plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination

Questions by Mr. Walker:

Q. Will you state your name, your address and your occupation, please?

A. I am Mrs. Doris Daniel, 1204 Ringo, I am employed as secretary for Attorney Christopher C. Mercer, Jr.

Q. What is your race?

A. I am a Negro.

Q. Will you state to the Court what happened when you went out to the Lake Nixon Club on or about July 10, 1966?

A. Well, we approached the window where we saw the people were being admitted, and the young man, we happened to be at a window and a young man said may I help you; and we said we would like to come in; and this man said we would have to wait on the lady in the next room; and we told her that we would like to come in and she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we

asked to get application to apply for membership and she said I'm sorry, but we're filled up and not accepting any more memberships; and we said thank you, and left.

Mr. Walker: No more questions.

Cross Examination

Q. Where do you live?

A. 1204 Ringo.

Q. Here in Little Rock?

A. Yes, sir.

Q. How long have you lived in Little Rock?

A. About seven years.

Q. Seven years?

A. Yes, sir.

Q. Will you speak a little louder, please; I'm kinda-hard of hearing? Where is Lake Nixon?

A. I would estimate about ten or twelve miles out 12th street, it might be more than that, or less, I knew it is out 12th street, West.

Q. Out 12th Street?

A. Yes.

Q. Had you ever been there before?

A. Before the day I went out there?

Q. Yes.

A. No.

Q. Why did you go out there?

A. I had heard advertising on the radio and I heard some people talking about it, and I just went out to look it over and perhaps participate in some of the activities.

Q. That was just on your own initiative?

A. Yes.

Q. You just decided to go out and did you go out to go in swimming?

A. Sir?

Q. Did you go out to go in swimming?

A. Perhaps to swim, but I had heard about the miniature golf and I like to play miniature golf, and we just wanted to look it over.

Q. You hadn't made any prearrangements with anybody about going out there?

A. No.

Q. You just thought it up yourself?

A. Well, Roselyn and I decided to go out there.

Q. Your girl friend and yourself?

A. Yes.

Q. Just the two of you went out there?

A. No, we were accompanied by a young man.

Q. Whose car did you go in?

A. We were in his car.

Q. Had he ever been out there before?

A. Not as I know of.

Q. Did you have a swim suit?

A. I had mine, yes.

Q. You had a swim suit with you?

A. Yes, sir.

Q. I'm sorry, but I didn't get your address?

A. 1204 Ringo.

Q. 1204 Ringo?

A. Yes.

Q. Here in the City of Little Rock; do you go in swimming often?

A. Not very often.

Q. When is the last time you went swimming?

A. I think it was July 4th, I think it was a holiday.

Mr. Robinson: That is all.

Mr. Walker: No more questions.

The Court: You may stand aside.

(Above witness temporarily excused.)

Mr. Walker: That is all we have, Your Honor.

The Court: Judge Robinson, do you have any rebuttal.

Mr. Robinson: Your Honor, I move for a directed verdict for the defendant on the evidence adduced here.

The Court: What you're suggesting then is that the Plaintiff has not made a case which would entitle, or the plaintiffs have not made cases which would entitle them to relief. This may or may not be true; I'm not prepared to pass on it at the moment, so I believe I'll reserve ruling on your motion for judgment for the defendant and the case will proceed. If you have any evidence to offer the Court will hear it. If you choose to rest with the plaintiff, of course, the case will be submitted on the record as it now stands.

Mr. Robinson: May it please the Court, may I have a few minutes to consider that?

The Court: You may.

(Brief conference between counsel and defendant.)

Mr. Walker: I want to call to the Court's attention that there are certain stipulations that we have prepared to present into the record subsequent to—

The Court: I understand that, of course, about these figures you are going to supply. You're going to supply certain figures and then you'll still have to furnish physically certain of the ad copy. Subject to the receipt of those the plaintiff's case is closed.

Mr. Gilbert: I think you ought to let the record show that without objection Mrs. Euell Paul, Jr., is a party defendant in 149.

The Reporter: I have that already, Your Honor.
The Court: Very well.
Judge Robinson: Call Mrs. Oneta Paul.

MRS. ONETA IRENE PAUL,

called as a witness by and on behalf of defendant, being duly sworn, was examined and testified as follows:

Direct Examination

Questions by Judge Robinson:

Q. State your name to the Court?
A. Oneta Irene Paul.
Q. Where do you live, Mrs. Paul?
A. Lake Nixon, Route 1, Box 77-A, Little Rock.
Q. Is that the place called Lake Nixon?
A. Yes, it is.
Q. Who owns that property, Mrs. Paul?
A. My husband and I.
Q. When did you acquire that property?
A. September 27th will be four years ago, that will be '62.
Q. '62; how much land is involved in that property out there?
A. Approximately 232 acres.
Q. Now, is there a lake on the property called Lake Nixon?
A. Yes, there is.
Q. You and your husband live there close to that?
A. We do.
Q. You have your home there?
A. Yes, we do.

Q. What did you pay for that property?

A. One hundred thousand dollars.

Q. Have you spent anything by way of improvements since you acquired it?

A. Yes, on the lake.

Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?

A. Yes, we do, we operate it as a club.

Q. Now, at the time that you put this on a club basis did you do it for the purpose of excluding Negroes?

A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate undesirables.

Q. You made a club out of it for the purpose of keeping out—as a matter of fact, undesirable white people?

A. Yes, we have.

Q. Do you take advantage of that arrangement that you have, the club arrangement, to keep out undesirable white people?

A. I don't follow you.

Q. To keep undesirable white people from entering the place?

A. We do, we have.

Q. Then you also use that reason as excluding the Negroes.

A. Right.

Q. Mrs. Paul, how many people do you have out there during the summer; when did you open the facility?

A. The facility is opened between the 5th, the middle or last of May. It is all based on the weather and the rain and—

Q. How many people would you say you have out there?

A. I couldn't give you an exact figure, because we have so many out there, but I would approximately say around a hundred thousand people come and go.

Q. Are these pictures of the place out there?

A. Yes.

(Documents passed to opposing counsel.)

Mr. Walker: No objection.

Judge Robinson: We would like to introduce this batch of pictures as Defendant's Exhibit 1.

(Thereupon, the documents above referred to were marked as Defendant's Exhibit No. 1, for identification.)

The Court: Let them be received as a group. Do you have an envelope we can put them in, and if you will just mark the envelope Defendant's Exhibit 1, and I will put them all in it.

(Thereupon, the documents heretofore marked as Defendant's Exhibit No. 1, for identification, were received in evidence.)

Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?

A. Members of Lake Nixon.

Q. To members of Lake Nixon?

A. To all members of Lake Nixon it usually ran.

Q. Do you know the plaintiffs in this case?

A. I'm afraid not.

Q. You don't know whether they applied for admission or not?

A. Well, I don't recognize them.

Q. You know that two or three Negroes did apply for admission?

A. Three, yes; the man is the one that asked for membership cards, not the lady.

Q. And you denied them admission?

A. Yes, I did.

Q. You denied them admission because they are Negroes?

A. Yes, I did.

Q. Do you think you could operate that business out there as an integrated—

A. No, we could not.

Q. And I believe you say that you've got over a hundred thousand dollars invested in it?

A. Yes, now, way over.

Judge Robinson: I believe that's all.

Cross Examination

Questions by Mr. Walker:

Q. Mrs. Paul, when did you start operating Lake Nixon as a public facility?

A. As a public facility, what—

Q. Was it in operation during 1964?

A. Yes, it has been operated since we bought it.

Q. When was that?

A. September 27th will be four seasons, will that be '62?

Q. So you have operated it—

A. Four years, four seasons.

Q. You've operated it from '62 to '64 just for white persons?

A. No; we've operated all these years since we've had it just for white people.

Q: I see; what I'm trying to establish, from 1962, at the time you got it, to 1964 it was not a private club?

A. They did not have to have a membership card, no.

Q. And after 1964 you changed it into a private club?

A. Membership, yes.

Q. Membership only?

A. Yes.

Q. Now, between 1962 and 1964 did you have the right to exclude anybody you wanted to?

A. We certainly did.

Q. What right do you have now?

A. It is our property, we live there.

Q. What right do you have to exclude anybody now that you did not have in 1963 or '62, when you bought it?

A. We had a right then; we figured it was our property, we pay the tax on it.

Q. And you still figure that, don't you?

A. Yes, we live there.

Mr. Walker: No more questions.

Redirect Examination

Questions by Judge Robinson:

Q. We have a map of Pulaski County, does that red mark indicate the location of Lake Nixon?

A. Yes, it does.

Judge Robinson: By stipulation, may it please the Court, I would like to introduce this map in evidence.

(Thereupon, the document above referred to was marked as Defendant's Exhibit No. 2, for identification.)

The Court: Allright; that will be defendant's Exhibit No. 2?

Judge Robinson: Defendant's Exhibit 2. Would the Court like to see it?

The Court: Yes, I would like to see it.

(Document passed to the Court.)

The Court: The little red mark there indicates the location.

(Thereupon, the document heretofore marked as Defendant's Exhibit No. 2, for identification, was received in evidence.)

Judge Robinson: I believe that is all.

The Court: Anything further?

Mr. Walker: No, Your Honor.

The Court: You may stand aside.

(Above witness temporarily excused.)

Judge Robinson: That is the Defendant Paul's case, Your Honor.

The Court: Any rebuttal?

Mr. Walker: No, Your Honor.

The Court: Then, your record will be closed in 149 upon receipt of the figures that you Gentlemen have agreed were to be filed later, and the materials from the radio stations.

Mr. Walker: May it please the Court, we have introduced all that we want.

The Court: You think then one ad is sufficient?

Mr. Walker: Yes, sir, I think it will reflect the time that they were advertised.

The Court: So we will have then only certain figures from the books?

Mr. Walker: That's right, Your Honor.

The Court: Now, Gentlemen, are you ready to go to No. 150?

Memorandum Opinion

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

LR-66-C-149

ROSALYN KYLES and DORIS DANIEL,

Plaintiffs,

v.

EUELL PAUL, JR., Individually and as Owner Manager or Operator of the LAKE NIXON CLUB,

Defendant.

LR-66-C-150

ROSALYN KYLES and DORIS DANIEL,

Plaintiffs,

v.

J. A. CULBERSON, Individually and as Owner, Manager or Operator of SPRING LAKE, INC.,

Defendant.

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 et seq., 78 Stat. 243 et seq., 42 U.S.C.A., §§2000a and 2000a-1 through 2000a-6, have been consolidated for trial and have been tried to the Court without a jury. Federal jurisdiction is not questioned and is established adequately by reference to section 207 of the Act, 42 U.S.C.A., §2000a-6.

Memorandum Opinion

Plaintiffs are Negro citizens of Little Rock, Pulaski County, Arkansas. The defendants in No. 149, Mr. and Mrs. Euell Paul, Jr., own and operate a recreational facility known as Lake Nixon. The corporate defendant in No. 150, Spring Lake Club, Inc., own and operate a similar facility known as Spring Lake. All of the stock in Spring Lake Club, Inc., except one qualifying share, is owned by the defendant, J. A. Culberson, and his wife.

The two establishments are not far from each other. Both are located in Pulaski County some miles west of the City of Little Rock. In July 1966 the two plaintiffs presented themselves at both establishments and sought admission thereto. They were turned away in both instances on the representation that the establishments were "private clubs."

On July 19 plaintiffs commenced these actions on behalf of themselves and others similarly situated. The complaints allege in substance that both Lake Nixon and Spring Lake are "Public Accommodations" within the meaning of Title II of the Act, and that under the provisions of section 201(a) they, and others similarly situated, are "entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations (of the facilities) without discrimination or segregation on the ground of race, color, religion, or national origin." They pray for appropriate injunctive relief as provided by section 201 of the Act.

In their answers the defendants[1] deny that Lake Nixon

[1] Originally, the suits were brought against Mr. Paul and Mr. Culberson only. At the commencement of the trial Mrs. Paul and Springs Lake Club, Inc., were made parties defendant without objection, and they have adopted, respectively, the answers of Mr. Paul and Mr. Culberson.

and Spring Lake are public accommodations within the meaning of the Act; affirmatively, they plead that the two facilities are "private clubs" and are exempt from the Act by virtue of section 201(a), even if initial coverage exists.

Sections 201(a) and 201(b) of the Act prohibit racial discrimination in certain types of public accommodations if their operations "affect" interstate commerce, or if racial discrimination or segregation in their operation is "supported by State action."

Section 201(b) makes the prohibition applicable to four categories of business establishments, namely:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201(c) sets forth criteria whereby it may be determined whether an establishment affects interstate commerce. That section is as follows:

"The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (1) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

Section 201(d) is as follows:

"Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is car-

ried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

The exemption invoked by defendants appears in section 201(e) which provides that the provisions of Title II of the Act do not apply to "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

Federal prohibitions of racial, ethnic or religious discrimination or segregation in State and municipal facilities are based ultimately on the 14th Amendment to the Constitution of the United States. Title II of the Civil Rights Act of 1964 finds its constitutional sanction in the commerce clause of the Constitution itself. Constitution, Article 1, Section 8, Clause 3. That Title II, as written, is constitutional is now settled beyond question, at least as far as this Court is concerned at this time. Heart of Atlanta Motel v. United States, 379 U.S. 241; Katzenbach v. McClung, 379 U.S. 294; Willis v. The Pickrick Restaurant, E.D. Ga., 231 F.Supp. 396, appeal dismissed; Maddox v. Willis, 382 U.S. 18, rehearing denied, 382 U.S. 922.

The rationale of those holdings is that Congress permissibly found that racial discrimination, including racial segregation, in certain types of business establishments adversely affects interstate commerce, and acted constitutionally to prohibit such discrimination. These cases also establish that, even though practices on the part of an individual enterprise have no significant or even measurable impact on commerce, such practices by such enterprise

Rock Today," a monthly magazine indicating available attractions in the Little Rock area, and inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base at Jacksonville, Arkansas.

On June 4, and June 30, 1966, Spring Lake advertised Saturday night dances over Radio Station KALO; on May 26, 27, and 28 a dance was advertised over Station KAAY. Station KALO apparently leased the premises for a picnic held in July and advertised that picnic from June 6 through July 16.

In 1965 Spring Lake advertised certain dances by means of announcements over Station KALO. Two of these announcements indicated that there would be diving exhibitions during the intermissions, and one of the announcements was to the effect that in addition to the diving exhibition there would be a display of fireworks.

The record contains a sample of a brochure put out by Spring Lake; that brochure shows pictures of the facilities, describes them in some detail, refers without emphasis to "guest fees" in addition to the regular admission charge and points out that the fee of twenty-five cents is to be paid only once. Readers of the brochure are advised that the facilities may be reserved for private parties by telephoning "well in advance." The brochure also contains a map showing one how to reach Spring Lake, and the "membership cards" of Spring Lake depict a similar map.

As stated, both establishments are located some miles west of Little Rock. Both are accessible by country roads; neither is located on or near a State or federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such, and the location of the facilities is such that it would be in the highest degree un-

likely that an interstate traveler would break his trip for the purpose of utilizing either establishment. Of course, it is probably true that some out-of-state people spending time in or around Little Rock have utilized one or both facilities.

Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The meat products sold by defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. The bread used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources.

Turning now to the law, the Court will take up the issues in what appears to it to be a convenient, if perhaps not a strictly logical, order.

Defendants' claims of exemption as private clubs will be rejected out of hand. The Court finds it unnecessary to attempt to define the term "private club," as that term is used in section 201(a) because the Court is convinced that neither Lake Nixon nor Spring Lake would come within the terms of any rational definition of a private club which might be formulated in the context of an exception from the coverage of the Act. Both of these establishments are simply privately owned accommodations operated for profit and open in general to all of the public who are members of the white race. Cf. United States v. Northwest Louisiana Restaurant Club, W.D. La., 256 F. Supp. 151.

The Court finds without difficulty that plaintiffs were excluded from both facilities because they are Negroes. That fact was expressly admitted by Mr. Paul speaking for Lake Nixon and is inferable if not substantially admitted with respect to Spring Lake. The Court finds also that any other individual Negroes who might have applied for admission to the facilities during 1966 would have been excluded on account of their race, and that defendants will continue to exclude Negroes unless the Court determines that the facilities are covered by the Act.

This brings the Court to a consideration of the basic issue of coverage. The question is not whether Lake Nixon and Spring Lake are "public accommodations," but whether they are public accommodations falling within one or more of the four categories of establishments covered by the Act.

It is not suggested that either establishment falls within the first statutory category, and the Court is persuaded that neither falls within the fourth. In that connection the Court finds that both Lake Nixon and Spring Lake are single unit operations with the sales of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public. Section 201 (b)(4) plainly contemplates at least two establishments, one of them covered by the Act, operating from the same general premises. See e.g. Pinkney v. Meloy, M.D. Fla., 241 F. Supp. 943. That situation does not exist here.

The second category set out in section 201(b)(2) consists of establishments "principally engaged" in the sale of food for consumption on the premises. Food sales are not the principal business of the establishments here involved, and the second category does not cover them. Cf.

Newman v. Piggie Park Enterprises, Inc., D.C., S.C., 256 F. Supp. 941.[4]

The third category, section 201(b)(3), includes certain specifically described places of exhibition or entertainment and also "any other place of exhibition or entertainment." It is clear that neither Lake Nixon nor Spring Lake is a motion picture house, concert hall, theatre, sports arena, or stadium. Hence, if either establishment is covered by the third category it must be on the theory that it falls within the catch-all phrase above quoted.

Determination of the scope of the catch-all phrase calls for an application of the Rule of ejusdem generis. Robertson v. Johnston, E.D. La., 248 F.Supp. 618, 622. In that case it was pointed out that "place of entertainment is not synonymous with "place of enjoyment." And in addition this Court will point out that "entertainment" and "recreation" are not synonymous or interchangeable terms.

The statutory phrase "other place of exhibition or entertainment" must refer to establishments similar to those expressly mentioned. When one considers the exhibitions and entertainment offered by motion picture houses, theatres, concert halls, sports arenas and stadiums, it is clear at once that basically patrons of such establishments are edified, entertained, thrilled, or amused in their capacity of spectators or listeners; their physical participation in what is being offered to them is either non-existent or minimal; their role is fundamentally passive.

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[4] In using the term "food sales" the Court includes sales of both food and soft drinks. That sales of drinks would not be considered as sales of "food" is indicated by Chava v. Sdrales, 10 Cir., 344 F. 2d 1019; Robertson v. Johnston, E.D. La. 249 F. Supp. 615; Tyson v. Cazes, E.D. La., 238 F. Supp. 937, rev'd on other grounds, 3 Cir. 363 F. 2d 742.

are prohibited where they are of a type which Congress has found affects commerce adversely.

In coming to the latter conclusion the Court in McClung drew an analogy between an individual business man who practices racial discrimination and an individual farmer who violates a provision of the Government farm program. It was said (pp. 300-301 of 379 U.S.):

"It goes without saying that, viewed in isolation, the values of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111 (1942):

"'That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of many others similarly situated, is far from trivial. . . .'"

The burden in these cases is upon the plaintiffs to establish, first, that the facilities in question are establishments covered by the Act and, second, that plaintiffs have been subjected to racial discrimination prohibited by the Act. On the other hand, the burden is upon the respective defendants to show that they are entitled to the private club exemption which they invoke.

There is no serious dispute as to the facts in either case.

Lake Nixon has been a place of amusement in Pulaski County for many years. Several years ago the properties were acquired and improved by Mr. and Mrs. Paul, the present owners and operators. The Spring Lake property was acquired by Mr. Culberson in the spring of 1965 and the Spring Lake Club, Inc., was organized as an ordinary

business and corporation under the general corporation laws of Arkansas on April 12 of that year.[2] Both establishments are operated for the financial profit of the owners or owner. During 1963 and 1966 Lake Nixon earned substantial profits; Mr. Culberson is not sure whether Spring Lake has earned profits; no dividends have been paid by the corporation, and Mr. Culberson has drawn no salary. He is engaged in a number of business enterprises, and Spring Lake is actually operated by hired employees of the corporation.

The facilities available at both establishments are essentially the same although those at Lake Nixon are considerably more extensive than those available at Spring Lake. Primarily, the recreation offered is of the outdoor type, such as swimming, boating, picnicking, and sun bathing. Lake Nixon also has a miniature golf course.

There is a snack bar at each establishment at which hamburgers, hot dogs, some sandwiches, soft drinks, and milk are sold to patrons during 1965 and 1966. However, the snack bar operations were purely incidental to the recreational facilities, and the income derived from the sales of food and drinks was small in comparison to the income derived from fees for the use of the recreational facilities. About the middle of August 1966 and after this suit was filed, the sale of food items at Spring Lake was discontinued entirely.

In each of the snack bars there is located a mechanical record player, commonly called a "Juke Box," which pa-

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[2] Mr. Culberson did not recall definitely whether title to the property was taken originally in his name and then transferred to the corporation or whether the former owner conveyed directly to the corporation. The matter is not material. Mr. Culberson's primary purpose in incorporating his operation was to avoid personal tort liability in case of accidental injury to a patron.

trons operate by the insertion of coins. Patrons may dance to the juke box music or may simply sit and listen to it. There is no dispute that the juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines. The machines are rented from their local owner or owners by both of the establishments here involved.

During the months in which Lake Nixon is open, a dance is held once a week on Friday or Saturday night. An attendance charge is made with respect to these dances, and there is "live music" supplied by local bands made up of young people who call themselves by such names as "The Romans," "The Pacers," or "The Gents." Although the bands are compensated for their playing, actually the musicians are little more than amateurs, and their operations do not in general extend beyond the Little Rock-North Little Rock areas; certainly, there is nothing to indicate that these young musicians move in interstate commerce.

On occasions similar dances are held at Spring Lake, but they are sporadic and care is taken not to schedule a dance at Spring Lake for the same night on which a dance is to be held at Lake Nixon.

The operators of both facilities have stated candidly that they do not want to serve Negro patrons for fear of loss of business, and they do not desire to be covered by the Act. In this connection it apears that Mr. Gulberson is willing to do just about anything in the future to avoid coverage if Spring Lake is in fact covered and nonexempt at this time.

Following the passage of the Act, Mr. and Mrs. Paul began to refer to their operation as a private club, and partons have been required, at least during 1965 and 1966, to purchase "memberships" for the nominal fee of twenty-

five cents a year or per season. These fees are in addition to regular admission charges. A similar procedure has been following at Spring Lake which was not organized until after the passage of the Act. At Lake Nixon "memberships" to the "club" are sold by either Mr. or Mrs. Paul; at Spring Lake "memberships" are sold by whatever employee or employees happen to be in charge of the operation at the time.

The Court finds that neither facility has any membership committee; there is no limit on the number of members of either "club," [3] no real selectivity is practiced in the selection of members, although at each establishment the management reserves the right to refuse to adult undesirables; there are no membership lists. The Pauls do not know how many people are "members" of the Lake Nixon Club; Mr. Culberson estimates that Spring Lake, the smaller of the operations, has about 4,000 "members." Subject to a few more or less accidental exceptions at Spring Lake, Negroes are not admitted to "membership" in either "club." White applicants for membership are admitted as a matter of routine unless there is a personal objection to an individual white person making use of the facilities.

The record reflects that during 1965 and 1966 Lake Nixon has used the facilities of Radio Station KALO to advertise its weekly dances; the announcements were made on Wednesday, Thursdays, and Fridays of each week from the last of May through September 7. During the same period Lake Nixon inserted one advertisement in "Little

[3] When plaintiffs applied for admission to Lake Nixon and asked about joining the "club," they were told that the membership was full; the Pauls now admit that such statement was false in that there has never been and is not now any limit to the "membership" of the "club".

The difference in what is offered by the establishments named in section 201(b)(3) and what is offered at Lake Nixon and Spring Lake is obvious. The latter establishments do not offer "entertainment" in the sense in which the Court is convinced that Congress used the word; what they offer primarily are facilities for recreation whereby their patrons can enjoy and amuse themselves.

In adopting section 201(b)(3) Congress must have been aware that "entertainment" and "recreation" are not synonymous or co-extensive, and had Congress intended to provide coverage with respect to a "place of recreation," it could have said so easily. The Court thinks that it is quite significant that neither the category in question nor any other category mentioned in section 201(b) makes any mention of swimming pools, or parks, or recreational areas, or recreational facilities. And the Court concludes that establishments like Lake Nixon and Spring Lake do not fall within section 201(b)(3) or any other category appearing in that section as it is presently drawn.

In coming to this conclusion the Court has not overlooked the dancing which has gone on at both establishments or the diving exhibitions and fireworks display at Spring Lake. These exhibitions and that display were isolated events which took place in 1965, which have not been repeated, and which Mr. Culberson says will not be repeated. They were insignificant anyway, and it appears that the diving, which was done by life savers employed by Spring Lake, was not so much for the purpose of entertaining patrons as to demonstrate to them the competency of the life saving personnel.

As to the dancing, there are two things to be said: first, the dances held at Spring Lake play no significant part in the operations of that establishment, and the part played

by the dances held regularly at Lake Nixon would seem to play a minor role in the Lake Nixon operation. Second, and more basically, it seems to the Court that dancing, whether to "live music" or to records played on a juke box, falls more within the concept of "recreation" than within the concept of "entertainment".

But, even if it be conceded to plaintiffs that the challenged establishments are "places of entertainment," the Court cannot find that under the law their operations affect interstate commerce. Certainly, the racial discrimination which the defendants have practiced has not been supported by the State of Arkansas or any of its political subdivisions.

Referring to section 201(c), the criterion which it establishes for the determination of whether a place of exhibition or entertainment "affects commerce" is whether the establishment in question customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment **which move in commerce.**" (Emphasis supplied.)

The emphasized words are not without significance when read in comparison with the statutory criterion for determining whether the operations of an eating establishment affect interstate commerce. With regard to such an establishment it is sufficient if it has served or offered to serve interstate travelers or if a substantial portion of the food which it serves **has moved** in interstate commerce. There is a distinct difference between person or thing which **moves** in interstate commerce and a person or thing which simply **has moved** in interstate commerce.

As indicated, there is no evidence here and no reason to believe that the local musicians who play for the dances at Lake Nixon and Spring Lake have ever moved as musicians in interstate commerce or that they are now doing so. Nor do the juke boxes, the records and other recrea-

tional apparatus, such as boats, utilized at the respective establishments "move" in interstate commerce, although it is true that the juke boxes, some of their records, and part of the other recreational equipment and apparatus were brought into Arkansas from without the State.

The Court's approach to and its solution of the problems presented by these cases find full support in the opinion of Judge West in Miller v. Amusement Enterprises, Inc., E.D. La., 239 F.Supp. 323, a case involving a privately owned amusement park in Baton Rouge, Louisiana.[5]

From what has been said it follows that a decree will be entered dismissing the complaints in the respective cases.

Dated this 1st day of February, 1967.

s/ J. SMITH HENLEY
United States District Judge

[5] That case was decided on September 13, 1966, and the opinion was published on December 12 of that year after the instant cases were tried.

Decree

These two cases having been consolidated for purposes of trial and having been tried together, and the Court being well and sufficiently advised, and having filed herein its opinion incorporating its findings of fact and conclusions of Law in both cases,

It is by the Court Considered, Ordered, Adjudged, and Decreed that plaintiffs in said cases take nothing by their complaints, and that both of said complaints be, and they hereby are, dismissed with prejudice and at the cost of plaintiffs.

Dated this 1st day of February, 1967.

s/ J. Smith Henley
United States District Judge

Stipulation

It is hereby stipulated between counsel for Lake Nixon and for the plaintiffs that Lake Nixon had a gross income of $10,468.95 from food sales during the 1966 season. Of this amount, purchases of food amounted to $5,550.87; payroll, insurance and depreciation amounted to $3,478.46; and food insurance amounted to $27.00. The net profit from food and concession sales amounted to $1,412.62.

Notice of Appeal

Please take notice that plaintiffs in the above-styled case hereby appeals from the decision and decree of the United States District Court for the Eastern District of Arkansas, Western Division, entered in this cause by the Honorable J. Smith Henley, District Judge, on February 1, 1967.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Appellants,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of LAKE NIXON CLUB,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[May 3, 1968.]

Before VAN OOSTERHOUT, Chief Judge; MEHAFFY and HEANEY, Circuit Judges.

MEHAFFY, Circuit Judge.

Doris Daniel and Rosalyn Kyles, plaintiffs-appellants, Negro citizens and residents of Little Rock, Pulaski County, Arkansas, were refused admission to the Lake Nixon Club, a recreational facility located in a rural area of Pulaski County and owned and operated by the defendant-appellee Euell Paul, Jr. and his wife, Oneta Irene Paul. Plaintiffs

brought this suit seeking injunctive relief from an alleged discriminatory policy followed by defendant denying Negroes the use and enjoyment of the services and facilities of the Lake Nixon Club.[1] This suit was brought as a class action under Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 *et seq.*, 78 Stat. 243 *et seq.*, 42 U.S.C. §§ 2000a *et seq.*, alleging that the Lake Nixon Club is a "public accommodation" as the term is defined in the Act, and that, therefore, it is subject to the Act's provisions.

For the purpose of trial this case was consolidated with a similar suit brought by plaintiffs against Spring Lake Club, Inc. The trial was to Chief District Judge Henley who held that neither Lake Nixon Club nor Spring Lake, Inc. was a "public accommodation" as defined in and covered by Title II of the Civil Rights Act of 1964, and ordered dismissal of the complaints. We are concerned solely with the court's decision with regard to Lake Nixon Club, since there was no appeal from the portion of the decision regarding Spring Lake, Inc. Chief Judge Henley's memorandum opinion is published at 263 F.Supp. 412. We affirm.

The plaintiffs alleged in their complaint that the Lake Nixon Club is a place of public accommodation within the meaning of 42 U.S.C. §§2000a *et seq.*; that it serves and offers to serve interstate travelers; that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; that its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia; that the Lake Nixon Club is oper-

[1] At the trial, an oral amendment was made and accepted making Mrs. Paul a party to the action.

ated under the guise of being a private club solely for the purpose of being able to exclude plaintiffs and all other Negro persons; and that the jurisdiction of the court is invoked to secure protection of plaintiffs' civil rights and to redress them for the deprivation of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States, Section 1; the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States; 42 U.S.C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States; and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000a *et seq.*, under which they allege that they are entitled to an injunction restraining defendant from denying them and others similarly situated admission to and full use and enjoyment of the "goods, services, facilities, privileges, advantages, and accommodations" of the Lake Nixon Club.

The defendant denied that Lake Nixon is a place of public accommodation within the meaning of the Act; denied that Lake Nixon serves or offers to serve interstate travelers or that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; denied that its operations affect travel, trade, commerce, transportation or communication between and through the several states and the District of Columbia within the meaning of the Act; and, further answering, averred that defendant operates Lake Nixon Club as a place to swim; that he has a large amount of money invested in the facility; that if he is compelled to admit Negroes to the lake, he will lose the business of white people and will be compelled to close his business; that the value of his property will be destroyed; and that he will

be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

The provisions of the Civil Rights Act of 1964 which define "a place of public accommodation" as covered by the Act, and which plaintiffs contend bring the Lake Nixon Club within its coverage, are contained in 42 U.S.C. § 2000a (b), and provide as follows:

> "(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce,* or if discrimination or segregation by it is supported by State action:
>
> "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> "(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> "(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which

holds itself out as serving patrons of such covered establishment." (Emphasis added.)

It will be noted that an establishment falling in any of the four categories outlined above is covered by the Act only "if discrimination or segregation by it is supported by State action," which is not contended here, or "if its operations affect commerce." The criteria for determining whether an establishment affects commerce within the meaning of the Act are set forth in 42 U.S.C. § 2000a (c), as follows:

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any

territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

The facts in the case are relatively simple and not in material dispute. The Lake Nixon property, consisting of 232 acres, is located on a country road several miles from the City of Little Rock and is not close to any state or federal highway. In 1962 Paul and his wife purchased this property, and since that time they have made their home there and operated the facility for recreational purposes. In 1964 they adopted a club plan in order to prevent undesirables from using the facility, with no thought of simply excluding Negroes, as no Negro had ever sought admission.[2] A membership fee of 25¢ per person per season was charged. The only Negroes who ever sought admission were the two plaintiffs and a young Negro man who accompanied them to Lake Nixon on July 10, 1966. When they sought to use the facilities, Mrs. Paul told them that the membership was filled, but candidly testified at the trial that their admission was denied because of their race. In response to written interrogatories propounded to Mr. Paul in a discovery deposition, he replied

[2] In this regard, Mrs. Paul testified as follows:

"Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?

"A. Yes, we do, we operate it as a club.

"Q. Now, at the time you put this on a club basis did you do it for the purpose of excluding Negroes?

"A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate the undesirables."

that he and his wife exercised their own judgment in accepting applicants for membership and refused those whom they did not want. Referring to the plaintiffs, Mr. Paul stated:

> "At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it."

Mr. and Mrs. Paul invested $100,000.00 in the property, and, although it is operated only during the swimming season—from some time in May until early September depending upon the weather—it has earned a substantial and comfortable livelihood for them, producing net profits in excess of $17,000.00 annually.

Plaintiff Mrs. Doris Daniel, who lived in Little Rock some twelve miles from Lake Nixon, was the only witness who testified on behalf of the plaintiffs. The other evidence is incorporated in pretrial answers to interrogatories and the testimony of Mr. and Mrs. Paul. Mrs. Daniel testified that she was employed as a secretary for Christopher C. Mercer, Jr. She further testified that she went to Lake Nixon Club on about July 10, 1966, accompanied by a girl friend, Rosalyn Kyles, the other plaintiff, and a male acquaintance. She told the attendant at the admission window that they would like to come in but was advised that they would have to wait and see the lady in the next room. Mrs. Paul was the lady to whom they were referred, and Mrs. Daniel testified that "she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we asked to

get application to apply for membership and she said I'm sorry, but we're filled up." This witness had never been to Lake Nixon before and testified that she had heard the advertising on the radio and people talking about it and went out to look it over, and perhaps participate in some of the activities. She took her swimming suit with her.

While the principal attraction at Lake Nixon is swimming, the facility also had, at the time of the trial of this case, fifteen aluminum paddle boats available for rent, two coin-operated juke boxes, and a miniature golf course. Also operated in connection with the business was a snack bar which offered for sale hamburgers, hot dogs, milk and soft drinks, but did not stock or sell coffee, tea, cigars, cigarettes, sugar or beer. On Friday nights there usually would be a dance at Lake Nixon with "live music" furnished by young musicians from the Little Rock area who were amateurs and also patrons of the facility. There is no evidence that they ever played outside this immediate locality, but to the contrary the undisputed evidence indicates that they did not.[3]

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[3] Mr. Paul testified on cross-examination as follows:

"Q. Now, did you have bands out at your place on the week ends?

"A. Yes.

"Q. Were they local bands?

"A. Yes.

"Q. Do you know whether those bands happened to play in Jacksonville?

"A. No.

"Q. You really don't know where they played, do you?

"A. Yes, I'm pretty certain they played just right here in Little Rock.

"Q. Just for you; what band was it?

"A. Well, we had the Romans, the Loved Ones. I can't remember the names of all—

Mr. Paul further stated in response to interrogatories that during the preceding twelve months the Lake Nixon Club had advertised only twice in a paper or magazine—one time in May in a local monthly magazine entitled "Little Rock Today," and one time in June in a monthly paper published at the Little Rock Air Force Base. Announcements of the dances were also made on a local radio station, inviting members of the club to attend.[4]

The food business at Lake Nixon was minimal. According to the stipulation of the parties, the net income from food and concession sales was only $1,412.62 for the entire 1966 season. There were an estimated 100,000 admissions to Lake Nixon during the season and the food sold there was a minor and insignificant part of the business. The

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"Q. You had a lot of different bands?
"A. Yes.
"Q. How can you be sure that they just played in Little Rock?
"A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals."

[4] Mr. Paul testified as follows:

"Q. Did you advertise for persons to come and make use of the facilities during the summer?
"A. Members only.

"A. Our opening statement was basically, well specifically stated that it was for members only.
"Q. For members only?
"A. Yes.

Mrs. Paul testified as follows:

"Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?
"A. Members of Lake Nixon.
"Q. To members of Lake Nixon?
"A. To all members of Lake Nixon it usually ran."

testimony was that the club was not in the food business but merely had the snack bar as a necessary adjunct to serve those who wished to refresh themselves during an afternoon or evening of participation in the various forms of recreation offered—swimming, boating, miniature golfing, or dancing.[5]

The district court found that Lake Nixon was not a private club but was simply a privately owned accommodation operated for profit and open in general to all members of the white race. The court further found that the defendants were excluded on account of their race but that the Lake Nixon Club did not fall within any of the four categories designated by Congress as "public accommodations" which affect commerce within the meaning of the Civil Rights Act of 1964, and, therefore, the Club was not subject to its provisions. We agree with the court's conclusion.

Plaintiffs do not contend that Lake Nixon falls within the first category pertaining to inns, hotels, motels, etc: They do, however, contend that the three remaining categories bring it within the Act.

As hereinbefore pointed out, the second category includes "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises," if its operations affect commerce, but not otherwise. In deter-

[5] Mr. Paul testified on cross-examination as follows:

"Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?

"A. No, very minor what we make off of that; food was just a commodity to have there for the people if they wanted it; I mean we were not in the food business—there was no restaurant— it was just a necessity."

mining whether its operations affect commerce, we must look to U.S.C. § 2000a (c), which provides that the operations of an establishment affect commerce within the meaning of this subchapter in the case of an establishment described in paragraph (2) of subsection (b), if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."

The trial court found that there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers as such, and that the location of the facility is such that it would be of the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing its facilities, it being located on a country road remote from either a federal or a state highway. With regard to the food served, the trial court reasoned that since the second category consists of establishments "principally engaged" in the sale of food for consumption on the premises and since food sales are not the principal business of the Lake Nixon Club, it would not be included in the second category. In this connection, the court held that the Lake Nixon Club was a single utilized operation, with the sale of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public, and that, therefore, it would not come within the fourth category making the Act applicable to an establishment otherwise covered or within the premises of which is physically located any such covered establishment.

With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased

locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record shows supplied the milk, obtains the unprocessed milk for its local plant from Arkansas dairy farmers.

Looking to the legislative history of the Civil Rights Act for an indication regarding what the proponents of the bill intended by the use of the word "substantial" in § 2000a (c), we note that Robert F. Kennedy, who was then Attorney General, expressed the opinion in the hearings on S. 1732 before the Senate Committee on Commerce that the word "substantial" means "more than minimal." *Codogan* v. *Fox*, 266 F.Supp. 866, 868 (M.D. Fla. 1967). In *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F.Supp. 941 (D. S.C. 1966), rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), cert. granted, 88 S.Ct. 87, the court held that where the evidence showed that at least 40% of the food moved in commerce, this was a "substantial" portion under a construction of the word in its usual and customary meaning, which the court defined as follows: "something of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from

something without value or merely nominal." In the *Newman* case, the district court held that the five drive-in restaurants belonging to Piggie Park Enterprises, Inc., all of which were located on or near interstate highways, were not covered by the Act because the evidence showed that less than 50% of the food was eaten on the premises, but the Fourth Circuit Court of Appeals reversed, holding that the test in construing this provision of the Act was not whether a principal portion of the food was actually consumed on the premises but whether the establishment was principally engaged in the business of selling food ready for consumption on the premises.

In *Willis* v. *Pickrick Restaurant*, 231 F.Supp. 396 (N.D. Ga. 1964), where the restaurant had annual gross receipts from its operations of over $500,000.00 for the preceding year and its purchases of food exceeded $250,000.00, the court found that a substantial part of this large amount of food originated from without the state and that, therefore, it affected commerce. Furthermore, while there was little evidence that it actually served interstate travelers, the evidence was clear that it offered to serve them by reason of the fact that it had large signs on two federal highways, and the restaurant itself was on the main business route of U. S. 41, a federal interstate highway.

In *Gregory* v. *Meyer*, 376 F.2d 509 (5th Cir. 1967), the court held that the question of the amount of food served in a restaurant which has moved in interstate commerce is a relative one and that the drive-in there involved, which had an annual sales of about $71,000.00, of which approximately $5,000.00 resulted from the sale of coffee and tea which had moved in interstate commerce, and which derived two-thirds of its sales volume from beef products

which came from a meat packer who purchased twenty to thirty per cent of his cattle from another state, was covered by the Act. Furthermore, the drive-in in the *Gregory* case was located only three blocks from a federal highway, on a street which was an extension of the highway, and the court found that it was engaged in offering to serve interstate travelers.

The case of *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), is likewise distinguishable. The Supreme Court there stated at page 298: "In this case we consider its [the Act's] application to restaurants which serve food a substantial portion of which has moved in commerce." The restaurant there was located on a state highway, eleven blocks from an interstate highway, and evidence was introduced that 46% of the food served was meat which had been procured from outside the state.

The case of *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), cited by plaintiffs, is likewise factually inapposite. In the *Evans* case, it was stipulated that a portion of the food served moved in interstate commerce and that each year out-of-state teams participated in team matches; further, that the golf shop sold golf equipment, most of which was manufactured outside the state and had moved in interstate commerce. The court found that the lunch counters at Laurel Links served and offered to serve interstate travelers and also that the defendant customarily presented athletic teams which moved in commerce, thereby bringing it under subsection (b), paragraph (3) and subsection (c) of 42 U.S.C. § 2000a. The court there said at page 477: "The Act applies because an out-of-state team plays on the defendant's course on a regularly scheduled annual basis.".

In the record before us, there is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food which it served moved in interstate commerce. Therefore, all of the cases cited by the parties are distinguishable inasmuch as there is not a word of record testimony here that would justify a conclusion that the concession stand engaged in or offered to engage in any business affecting commerce. The same can be said with respect to the recreational facilities at Lake Nixon. There is not one shred of evidence that Lake Nixon customarily presented any activity or source of entertainment that moved in interstate commerce.

The evidence here is that Lake Nixon is a place for swimming and relaxing. While swimming is the principal activity, it does have fifteen aluminum paddle boats which are leased from an Oklahoma-based company and a few surf boards. It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce. Furthermore, we do not interpret the law to be that coverage under the Act extends to businesses because they get a portion of their fixtures and/or equipment from another state. Otherwise, the businesses which the Act's sponsors and the Attorney General of the United States specifically said were not covered would be included in the coverage.[6] There were two juke boxes obtained from a local amusement company which provided music upon the insertion of a coin. As hereinbefore stated, there usually would be a dance on Friday nights if the weather was good, and the

[6] Senator Magnuson, floor manager of Title II, said that dance studios, bowling alleys and billiard parlors would be exempt, 110 Cong. Rec. 7406 (4/9/64); *Miller* v. *Amusement Enterprises, Inc.*, ... F.2d ..... (5th Cir. # 24259 9/6/67).

dances were sometimes advertised on a local radio station, apprising the members concerning the dance and inviting them to attend.

When the juke boxes were not utilized at the Friday night dances, a small band was provided but it was composed of local young amateurs and members of the Club, and there is no evidence whatsoever that they ever played outside Pulaski County. Such operations do not affect commerce under the definition of the statute which makes coverage applicable if the operation "customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." It was clearly not the intention of the Congress to include this type of recreation within the coverage of the Act, but, even if it should be construed as entertainment within the definition of the Act, it did not move in commerce and consequently is not proscribed.

The Civil Rights Act of 1964, as everyone knows, is a compromise act. It was not intended to be all inclusive, and, in this regard Senator Humphrey, a leading proponent of the bill, stated:

> "The reach of that title [H.R. 7152] is much narrower than when the bill was first introduced. It is also narrower than S. 1732, the bill reported by the Senate Commerce Committee, which covers the general run of retail establishments. . . . The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and of its intent to deal only with the problems which urgently require solution." 110 Cong. Rec. 6533.[7]

[7] This extract is taken from the legislative history furnished the Fifth Circuit by the Civil Rights Division of the Department of Justice and attached to the opinion in *Miller* v. *Amusement Enterprises, Inc., supra.*

Additionally, Senator Humphrey stated:

> "Of course, there are discriminatory practices not reached by H. R. 7152, but it is to be expected and hoped that they will largely disappear as the result of voluntary action taken in the salutory atmosphere created by enactment of the bill." 110 Cong. Rec. 6567.[8]

Senator Magnuson, who was floor manager of Title II, discussed this title in detail and said:

> "The types of establishments covered are clearly and explicitly described in the four numbered subparagraphs of section 201 (b). An establishment should have little difficulty in determining whether it falls in one of these categories. . . . Similarly, places of exhibition and entertainment may be expected to know whether customarily it (sic) presents sources of entertainment which move in commerce." 110 Cong. Rec. 6534.[9]

A section-by-section analysis of S. 1732 appears in 2 U. S. Cong. & Adm. News '64 at pages 2356 *et seq.* In a paragraph concerning subsection 3 (a) (2), it was stated:

> "This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or *other sources of entertainment which move in interstate commerce.*" (Emphasis added.)

We have no disagreement with the trial court's rationale or with its utilization of the rule of *ejusdem generis* in

[8] See n. 7.

[9] See n. 7.

arriving at its conclusion, but our view is that subsection (c) of the statute so plainly defines the operations that affect commerce that it is obvious that Lake Nixon's activities are not proscribed by the Act. Plaintiffs' argument that the Act applies is based on the false premise that a "substantial portion of the food sold has traveled through interstate commerce," which is wholly unsupported by the evidence. Treating this false assumption as a fact, plaintiffs then conclude that "the operation of the snack bar affects commerce within the meaning of § 201 (c) (2) of Title II."

In *Miller v. Amusement Enterprises, Inc.*, . . . F.2d . . . (5th Cir. # 24259 9/6/67), the panel requested the United States, acting through its Civil Rights Division in the Department of Justice, to file with the court its brief setting forth the legislative history of these provisions insofar as pertinent. The response of the Civil Rights Division is attached to that opinion. The opinion by the three-judge panel in *Miller* was subsequently reversed by a divided court sitting en banc in an opinion handed down April 8, 1968. We cite the panel's slip opinion merely because it incorporates the Government's reference to the legislative history of the Act, a part of which we have heretofore referred to. The facts in the *Miller* case are patently distinguishable from those in the instant case. As examples, in *Miller* the amusement park was "located on a major artery of both intrastate and interstate transportation; . . . its advertisements solicit the business of the public generally" and were not confined to club members; and "ten of its eleven mechanical rides admittedly were purchased from sources outside Louisiana."

What clearly distinguishes the case before us from other cases filed under this statute is the total lack of any evi-

dence that the operations of Lake Nixon in any fashion affect commerce. There is no evidence that any interstate traveler ever patronized this facility, or that it offered to serve interstate travelers, or that any portion of the food sold there moved in commerce, or that there were any exhibitions or other sources of entertainment which moved in or affected commerce.

The Congress by specifically and in plain language defining the criteria for coverage under subsection (c) precludes the court from holding upon any rule of construction that interstate commerce was affected absent requisite evidence establishing the criteria spelled out in the statute. There is no such evidence in this record.

We have read all the cases cited by the parties, as well as others, and our research has failed to disclose a single case where there was a complete absence of evidence, as there is in the instant case, to establish coverage under the Act.

The judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting:

In my view, the judgment of the District Court cannot be upheld. It is based on an erroneous theory of the law and is not supported by the facts found by the court.

The court held that the Lake Nixon Club is not a covered establishment under the Civil Rights Act of 1964, §§ 201 (b)(2) and (4), 42 U.S.C. 2000(b)(2) and (4) (1964), despite the fact that a lunch counter is operated on the premises, because the lunch counter is merely an adjunct to the business of making recreational facilities available to the public, and is not a separate establishment.

This conclusion is not supportable. Whether the lunch counter is an adjunct of or necessary to the operation of

the Club is immaterial, as is the question of whether the lunch counter is operated as a separate establishment or as a part of a coordinated whole.

Mr. Chief Justice Warren, commenting on the effect of a food facility in an amusement park in *Drews* v. *Maryland*, 381 U.S. 421, 428, n. 10 (1965),[1] stated:

> "There is a restaurant at Gwynn Oak Park; indeed, petitioners were standing next to it when they were arrested. If a substantial portion of the food served in that restaurant has moved in interstate commerce,[2] the entire amusement park is a place of public accommodation under the Act. * * * "

In *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), the court found that a golf course was a public accommodation within the meaning of the Act because it had a lunch counter located on it. It did this even though the lunch counter accounted for only fifteen per cent of the gross receipts of the golf course. (Lunch counter re-

[1] For reasons hereinafter stated, it is my opinion that, in this case, commerce requirements were met by a showing that the Club served and offered to serve travelers in interstate commerce, thus I do not reach the issue of whether a substantial portion of the food moved in interstate commerce.

[2] The defendant and others refused to leave an amusement park and were convicted in a Maryland State Court of disorderly conduct and disturbance of the peace. After having previously remanded the case to the State Court of Appeals, the Supreme Court dismissed a subsequent appeal and refused to grant certiorari. Mr. Chief Justice Warren, joined by Mr. Justice Douglas, dissented and would have granted certiorari. In the course of discussing the legal issues involved, the Chief Justice noted that although the 1964 Civil Rights Act was passed after the occurrence of the conduct for which the defendants were prosecuted, the Act abated the pending convictions. *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964). In the course of stating that view, he made the observations quoted above.

ceipts at Lake Nixon Club were approximately 22.8% of its gross income.)[3] In *Evans*, the court said:

> "The location of the lunch counter on the premises brings the entire golf course within the Act under 42 U.S.C. § 2000a(b)(4)(A)(ii) which provides that any establishment within the premises of which is located a covered establishment is a place of public accommodation. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964) (additional Majority Views, Hon. Robert W. Kastenmeier) U.S. Code Cong. & Admin. News, pp. 2409, 2410 (1964); Rasor, Regulation of Public Accommodations Via the Commerce Clause—The Civil Rights Act of 1964, 19 Sw.L.J. 329, 331 (1965)."

Id. at 476.

In *Adams* v. *Fazzio Real Estate Co., Inc.*, 268 F.Supp. 630 (E.D. La. 1967), the court held that the snack bar located on the premises of the bowling alley brought the entire facility under the Act. It stated:

> "The statute contains no percentage test, and it is not necessary to show that the covered establishment which magnetizes the non-covered establishment in which it is physically located occupies a majority, or even a substantial part of the premises, or that its sales are major or even a substantial part of the revenues of the establishment. • • • "

Id, at 638 (footnote omitted).

In *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966), the parties consented to the entry of an order pro-

[3] In 1966, the gross income from food sales was $10,468.95, as compared with a total gross income of $46,326.

viding that as long as an eating establishment was operated on the premises of a recreational facility, the entire facility would be considered a public accommodation within the meaning of the 1964 Civil Rights Act, and that the defendant would be enjoined from denying the equal use of the facility to any person on the basis of race or color.

Furthermore, House Report 914 stated that the establishments covered under § 201(b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II;" [4] and the additional views of the minority stated that "Section 201(d) precludes racial discrimination • • • . • • • [of] a department store (operating a lunch counter) • • • ." [5]

In *Drews*,[6] *Evans*, *Adams* and *Scott*, the records indicate that the lunch counter and the recreation facility were owned by the same entity and operated as one coordinated facility.

The District Court relies on *Pinkney* v. *Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965), to support its holding that a lunch counter must be a separate establishment (apparently separately owned) to evoke § 201(b)(4). There, the court held that a barber shop could not discriminate as it was located within a hotel, which was a covered establishment. The barber shop was separately owned, but that fact was not critical to the *Pinkney* decision. The legisla-

[4] House Report (Judiciary Committee) No. 914, 1964 *U. S. Code Cong. & Ad. News*, 2391, 2396.

[5] Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, 1964 *U. S. Code Cong. & Ad. News*, 2487, 2494.

[6] *Drews* v. *State*, 224 Md. 186, 167 A.2d 341, 342 (1961).

tive history of the Act gives an example the precise fact situation involved in *Pinkney*:

> "A hotel barber shop or beauty parlor would be an integral part of the hotel, *even though* operated by some independent person or entity [Emphasis added]." [7]

The majority opinion of this Court does not base its decision on the rationale of the District Court that Lake Nixon is not a covered establishment within the meaning of §§ 201(b)(2) and (4). It relies instead on an alternative ground, namely, that even if it is otherwise covered, "There is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food served moved in interstate commerce." One of these elements must, of necessity, be established to bring the Club within the Act.[8]

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[7] Senate Report (Judiciary Committee) No. 872, 1964 *U. S. Code Cong. & Ad. News*, 2355, 2358-59.

[8] It need not be established that the defendants' food "operations affect commerce" if the discriminatory practices by the defendants were "supported by state action." A state action theory of the case was not alleged nor argued.

The 1964 Civil Rights Act specifically defines "supported by state action:"

> "§ 201(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by the action of the State or political subdivision thereof."

An Arkansas statute purports to give an omnibus right to discriminate:

> "§ 71-1801. *Right to select customers, patrons or clients.*—Every person, firm or corporation engaged in any public busi-

As I read the District Court's decision, it avoided making a specific finding on whether the Club offered to serve interstate travelers. It did, however, state:

> "It is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon Club facilities]."

> ness, trade or profession of any kind whatsoever in the State of Arkansas, including, but not restricted to, * * * restaurants, dining room or lunch counters, * * *, or other places of entertainment and amusement, including public parks and swimming pools, * * *, is hereby authorized and empowered to choose or select the person or persons he or it desire to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; * * *."

Arkansas Statutes Annotated, Vol. 6A (1967 Supp).

The statute is further supported by criminal sanctions:

> "§ 71-1803. *Failure to leave after request—Penalty.*—Any person who enters a public place of business in this State, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager, or any employee thereof, and, after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. [Acts 1959, No. 169, § 3, p. 1007.]"

Arkansas Statutes Annotated, Vol. 6A (1967 Supp).

In view of the fact that I would reverse on other grounds, it is not necessary to express a view as to whether the plaintiff has made a prima facie case that the discrimination is supported by state action under § 201(b)(i) by simply showing that the defendant discriminated and that the statute explicitly gave him that right. *Cf., Adickes* v. *S. H. Kress & Company,* 252 F.Supp. 140 (S.D. N. Y. 1966). Furthermore, it is not necessary to express an opinion as to whether it is a defense to establish that the defendant would have discriminated regardless of the state statute. *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 846-47 (D.C. Cir. 1961) (dissenting opinion), *cert. denied,* 370 U.S. 925 (1962).

This statement, in my view, constitutes a clear and specific finding that the Club served interstate travelers and was sufficient in and of itself to satisfy the interstate commerce requirement of the Act set forth in § 201(c)(2)(b).[9] Since this requirement is satisfied, the Club is covered.

While it is not necessary to find additional grounds to satisfy the commerce requirements of the Act, the record also supports the conclusion that the Club offered to serve travelers in interstate commerce: (1) the Club advertised on KALO radio on Wednesdays, Thursdays and Fridays from the last of May through the 7th of September;[10] (2) it inserted one advertisement in "Little Rock Today," a monthly magazine, indicating available attractions in

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[9] The conclusion of the District Court draws additional support from the following facts:

(1) The defendants made no attempts to specifically exclude interstate travelers:

(a) The membership card did not require that the applicant sign his address;

(b) The advertisements did not suggest that an interstate traveler could not become a member; and

(c) There is no sign posted at the entrance which restricted the membership only to Arkansas residents.

(2) Members brought guests.

(3) Lake Nixon appears to be only about six to eight miles by road from the only federal highway between Little Rock and Hot Springs.

[10] The radio copy read as follows:

"Attention . . . all members of Lake Nixon. Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dance will be continued . . . this Saturday night with music by the Villagers, a great band you all know and have asked to hear again. Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf. That's Lake Nixon. . . ."

the Little Rock area in the same period; (3) it inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, at Jacksonville, Arkansas.

It is clear, as pointed out in the majority opinion, that the advertisements were directed to "members." It is thus argued that interstate travelers would not consider the invitation as having been addressed to them. I cannot agree. The membership idea was clearly a ruse to keep Negroes from using the Club. It was obviously understood to be such by the people living in the Little Rock area, and there is little reason to doubt that nonresidents would be less sophisticated. It also appears, from the choice of media, that the message was intended to reach nonresidents as well as local citizens. No other sound reason can be advanced for using mass media to promote "entertainment" at a "private" club.

The District Court rationalized that the Club was not a place of exhibition or entertainment as § 201(b)(3) was not intended to cover facilities where people came to enjoy themselves by swimming, golfing, boating or picnicking. It reasoned that the Act was only intended to apply to a situation "where patrons came to be edified, entertained, thrilled or amused in their capacity of spectators or listeners." While it is unnecessary to reach this issue here, the majority opinion reaches it, and thus I feel obliged to.

I cannot concur with the majority: (1) It is difficult to conclude that the Club was not a place of entertainment when the defendants characterized it in those terms in their radio advertisements: "Lake Nixon continues their policy of offering you year-round entertainment." Footnote 10, *supra*. See also, *Miller* v. *Amusement Enterprises*,

Inc., Civ. No. 24259 (5th Cir. April 8, 1968) (*en banc*), reversing 259 F.Supp. 523 (E.D. La. 1966). (2) It is equally difficult to conclude that the operation of the Club did not affect commerce within the meaning of § 201(c)(3), for the District Court specifically found that the juke boxes, which furnished music for dancing or listening, were manufactured outside of Arkansas, that some of the records played on them were manufactured outside of Arkansas, and that part of the other recreational equipment and apparatus (aluminum paddle boats and "Yaks"—surfboards) were brought into Arkansas from without the state. The fact that the aluminum paddle boats and the "Yaks" (surfboards) could have been manufactured in Arkansas is, in my judgment, not material when the District Court found and the record shows that they were leased and purchased [11] from an Oklahoma concern and imported into Arkansas.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[11] It appears from the record that the "Yaks" were purchased rather than leased:

"Q. Do you have any other kind of boats there?
"A. We have what we call a yak.
"Q. A yak; what's a yak?
"A. It's similar to a surfboard.
"Q. Similar to a surfboard; do you know where you purchased that?
"A. From the same company.
"Q. What company is that?
"A. Aqua Boat Company.
"Q. Who?
"A. Aqua Boat Company.
"Q. Is that a local Company?
"A. No.
"Q. Where is it?
"A. I believe they're in Oklahoma, Bartlesville."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824—September Term, 1967

DORIS DANIEL and ROSALYN KYLES,

Appellants,

vs.

EUELL PAULL, JR., Individually and as Owner, Manager or Operator of the LAKE NIXON CLUB.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

May 3, 1968.

Petition for Rehearing *En Banc*

[Cover omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Appellants,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

Appellants respectfully urge that this appeal, decided adversely to them on May 3, 1968, by a 2-1 decision of a panel of this court (Judges Mehaffy, Van Oosterhout, Judge Heaney dissenting), be set down for rehearing *en banc* because of (1) the important of the issues involved herein and their crucial relationship to effective enforcement of Title II of the Civil Rights Act of 1964; (2) the conflict between the majority opinion and the Fifth Circuit's *en banc* decision in *Miller* v. *Amusement Enterprises, Inc.* interpreting Sections 201(b)(3) and (c)(3) of the Act; (3) the conflict between the majority opinion here and the Fifth Circuit's opinion in *Fazzio*

Real Estate Co., Inc. v. *Adams* interpreting Section 201 (b)(4) of the Act; (4) the disagreement within the panel itself on these important issues. The panel's majority interpretation of these sections of the Act, if permitted to stand, will so seriously interfere with enforcement of Title II of the Civil Rights Act of 1964 that it should be reexamined by the entire membership of this court *en banc*.

I

There can be little doubt concerning the importance of the case. It is this court's first major interpretation of Title II of the 1964 Civil Rights Act, probably the most important legislation passed by the Congress in a quarter of a century or more and the most sweeping and far-reaching piece of civil rights legislation enacted since the Reconstruction Era. The policy expressed in Title II of the Act is one "that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L.ed. 2d 1263, 1265 (1968).

The majority's interpretation of the sections of the Act here involved differs so markedly from that expression of Congressional policy as to require a thoroughgoing reexamination by the full court. An additional highly important reason necessitating *en banc* consideration by this court is because the decision of the majority is now in conflict with the full Fifth Circuit Court as to the interpretation of §§ 201(b)(3) and (c)(3) of the Act and with a panel of that court as to § 201(b)(4). Obviously, the full bench of this court should consider whether these conflicts shall be permitted to stand.

II

A. Appellants have consistently maintained throughout this litigation that Lake Nixon is subject to the prohibition against racial discrimination contained in the Civil Rights Act of 1964 because it is a "place of entertainment" as that term is used in § 201(b)(3) of Title II (42 U.S.C. § 2000a(b)(3)). The district judge rejected this contention based upon a distinction between "entertainment" (spectator) and "recreation" (participant) which he felt was written into the Act. *Kyles* v. *Paul*, 263 F. Supp. 412, 419-20 (E.D. Ark. 1967). The same issue was involved in the recent decision in *Miller* v. *Amusement Enterprises*, —— F.2d —— (5th Cir. No. 24259, April 8, 1968) (en banc). The Fifth Circuit rejected the distinction:

> We are unable to agree with those concepts which would prefer, or those which would demand, that the Civil Rights Act be narrowly construed, i.e., the establishments referred to in § 201(b)(3) must be places of entertainment which present exhibitions for spectators and that such exhibitions must move in interstate commerce. However, while not necessary to our decision, as will be seen by a further reading of this opinion, we find that Fun Fair is covered by the literal terms of the Act. Although it may be that the types of exhibition establishments listed in § 201(b)(3) are those which most commonly come to mind, no one would dispute the proposition that such list is not complete or exhaustive. Therefore, any establishment which presents a performance for the amusement or interest of a viewing public would be included. In our view Fun Fair is such an establishment. The amusement park presents a performance of small chil-

dren riding on various mechanical "kiddie" rides plus a performance of ice skating. It is obvious to us that many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available. In fact Mrs. Miller's presence at the park was to see her children perform on ice.[9] While the record does not explicitly and clearly show this to be a fact, aside from Mrs. Miller's statement, we as Judges may take judicial knowledge of the common ordinary fact that human beings are "people watchers" and derive much enjoyment from this pastime.[10]

Thus, the Fifth Circuit has held that the participative-exhibitive dichotomy adopted by the district court below and accepted by the panel is not a viable distinction in light of the Act's purpose. Surely the swimming, boating, picnicking, sun-bathing and dancing activities occurring at Lake Nixon are as much, if not more, spectator activities as those which occur at Fun Fair Park. In any event, the Fifth Circuit's conclusion was reached after extensive examination by the full court. This court should do no less.

B. The panel's majority sustained the district court's interpretation of the "entertainment" provisions of Title II

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[9] In Mrs. Miller's deposition she stated:

"Yes, my little boy particularly was interested in showing off—showing me how well he could skate, too."

[10] The following is from the record:

"How many people would you say were present?

"Well, I can't say exactly. There were people skating; there were people sitting in the seats; there were people standing waiting to be served."

(Slip opinion pp. 10-11) (Footnotes in court's opinion)

on another ground—that no effect upon interstate commerce had been shown.

Appellants are unable to accept the statements of the majority that there was a "total lack of any evidence that the operations of Lake Nixon in any fashion affect commerce" (Slip opinion, p. 17). We particularly call to the attention of the court the fact that Lake Nixon placed an advertisement in the magazine, "Little Rock Today." This magazine was described by the district court as "a monthly magazine indicating available attractions in the Little Rock area," *Kyles* v. *Paul*, 263 F.Supp. 412, 418 (E. D. Ark. 1967). This magazine fulfills the same function in Little Rock that the "Key" magazine fulfills in St. Louis, and we note the following statement from the masthead of the May, 1968 edition:

> Published monthly and distributed free of charge by Metropolitan Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, new comers and tourists, and to reception rooms.

It should be obvious that any facility which places an advertisement in a magazine summarizing available attractions including entertainment opportunities and which magazine is distributed in hotels, willingly accepts, and indeed expects, the patronage of interstate travelers.[1] Certainly this Court may take judicial notice of the character of this magazine if it may take judicial notice of the "common knowledge" that a type of boat is manufactured in Arkansas (Slip Opinion, p. 14), leading to an

[1] The Club also advertised in *Little Rock Air Force Base* published at an Air Force base near Little Rock and over an area radio station (R. 11). Clearly, the facilities of Lake Nixon—including the concession stand—were "offered" to interstate travelers.

inference in the court's opinion that Lake Nixon's boating equipment was entirely intrastate, an inference clearly contradicted by the record (R. 14).[2] Furthermore, the Fifth Circuit concluded that the operations of the Fun Fair Amusement Park did affect commerce even though there was no proof whatsoever that the food sold at the concession stand originated outside Louisiana. In this case, the district court specifically found that ingredients of the hamburger buns and soft drinks originated outside Arkansas (263 F. Supp. at 418). The district court also discounted the influence of juke box records shipped in from outside the state,[3] but this reasoning was specifically condemned in the *Miller* case (see slip opinion at p. 17), and see *Twitty* v. *Vogue Theatre Corp.*, 242 F.Supp. 281 (M.D. Fla. 1965). Again, the rationale of the *Miller* case, if accepted by this Court, is clearly controlling and demands a reversal. (See especially, slip opinion, pp. 17-21.) That rationale should either be accepted or rejected by the entire Eighth Circuit where matters so important are concerned.

III

A. The consequences for the Civil Rights Act of 1964 will be equally grave if the concept of a "unitized operation," a locution which permits public accommodations to circumvent section 201(b)(4) of Title II is permitted to stand. This theory was first proposed by the district judge, without any authority therefor, and was approved in the majority opinion of the panel. Judge Heaney's

[2] Whether or not *some* boats of this type are manufactured in Arkansas, the boats involved in *this* case were imported from Oklahom (Slip opinion, p. 25).

[3] "There is no dispute that juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines" 263 F. Supp. at 417.

dissenting opinion exposes the irrational logic of the concept more clearly and eloquently than we are able, but we should like to emphasize the practical consequences of permitting this erroneous interpretation of the law to bear the stamp of this circuit. Thousands upon thousands of individual and corporate proprietors throughout the country who wish to discriminate against Negroes, or any other racial or religious group, and whom Congress wished to prohibit from engaging in such discrimination, will now be free to segregate their establishments by applying the circular reasoning of this case. First, it is said that Lake Nixon is not within section 201(b)(2) because it is not principally engaged in selling food. This statement is true enough—the major purpose of Lake Nixon's existence is not to sell food. However, the proprietor then argues, that there is no coverage under section 201(b)(4) because the food stand cannot be considered by itself to determine whether its principal intent is selling food (and thus whether it is a covered establishment within the premises of Lake Nixon and therefore whether Lake Nixon itself is covered). All this because the food stand is said to be merely an "adjunct" to the principal business of Lake Nixon. In effect, the food stand disappears from the view of the district court and the panel's majority in attempting to determine whether Lake Nixon is within the purview of the Civil Rights Act. And this despite the fact, which can hardly be contested, that the principal business of the food stand is selling food.

There was no basis for the district court's belief that Section 201(b)(4) contemplated an establishment under different ownership within the parent establishment. Even if that were so, the record here shows that while Lake Nixon was owned by Mr. and Mrs. Paul, the snack bar

was jointly owned by them and Mrs. Paul's sister (R.32). Thus, Lake Nixon meets even the judges' erroneous standard for coverage under Section 201(b)(4).

B. Beyond this, as a consequence of the Fifth Circuit's recent decision in *Fazzio Real Estate Co., Inc.* v. *Adams* (No. 24825, May 24, 1968) affirming *Adams* v. *Fazzio Real Estate Co.*, 268 F. Supp. 630 (E.D. La. 1967), there now exists a clear-cut conflict between the decision of this panel and that of the unanimous panel in *Fazzio Real Estate* [Judges Coleman and Clayton (who dissented from the en banc decision of the court in *Miller*); district judge Johnson]. The Fifth Circuit has affirmed a district court decision which rejected the "unitized operation" (263 F. Supp. 419) with sales "purely incidental to the recreational facilities" (263 F. Supp. 417) approach of the district court below and endorsed by the panel's majority here. As the court said:

> ". . . [I]f it be found—as it was in this case—that a covered establishment exists within the structure of a unified business operation, then under the provisions of Section 201(b)(4) of the Act the entire business operation located at those premises becomes a 'covered establishment.' The Act draws no distinction with regard to the principal purposes for which a business enterprise is carried on. Had a substantial business purpose test been intended, as urged by Fazzio, it would have been a very simple matter to include it in the Act. No such test was included with respect to the question of when the presence of one covered 'establishment' in a business enterprise will result in the entire operation's being treated as one establishment for the purpose of coverage under Sec-

tion 201(b)(4). In fact, the face of the Act specifically rebuts the existence of any substantial business purpose or 'functional unity' limitation on the meaning of the term 'establishment' as used throughout Section 201. Under Section 201(b)(4)(a) coverage may extend to both establishments within covered establishments and to an establishment 'within the premises of which is physically located any such covered establishment.'" (Slip opinion pp. 6-7)

* * * * *

"Fazzio's Bridge Bowl as an entity is not covered because it is principally engaged in selling food for consumption on the premises under Section 201(b)(2). Rather, Fazzio's is covered (1) because the refreshment counter is a covered establishment principally engaged in selling food for consumption on the premises within the meaning of Section 201(b)(2), and (2) because the covered refreshment counter is physically located within the premises of Fazzio's bowling operation [Section 201(b)(4)(a)(ii)] and the two stand ready to and do serve each others patrons. [Section 201(b)(4)(b)]." (Slip opinion pp. 7-8)

Obviously, the conflict of interpretation on this point should also be reviewed by the full court.

Conclusion

For the foregoing reasons, appellants urge that this petition for rehearing *en banc* be granted.

Respectfully submitted,

Norman C. Amaker
Jack Greenberg
Michael Meltsner
10 Columbus Circle
New York, New York 10019

John W. Walker
Norman J. Chachkin
1304-B Wright Avenue
Little Rock, Arkansas 72206

Attorneys for Appellants

Certificate

I hereby certify that the above petition is submitted in good faith and is not filed for delay. It is believed to be meritorious.

.....

NORMAN C. AMAKER

Certificate of Service

This is to certify that on this 31st day of May, 1968, I served a copy of Appellants' Petition for Rehearing *En Banc* upon Sam Robinson, Esq., Adkins Building, 115 East Capitol Street, Little Rock, Arkansas, by mailing a copy thereof to him at the above address via United States airmail, postage prepaid.

.....

NORMAN C. AMAKER
Attorney for Appellants

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

DORIS DANIEL, *et al.*, *Appellants,*

vs.

EUELL PAUL, JR., *etc.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

There is before the Court appellants' petition for rehearing *en banc* and on consideration of such petition, It is the Order of the Court that the petition for rehearing *en banc* be, and it is hereby, denied.

June 10, 1968